No. 4080.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

THOS. P. REVELLE,
United States Attorney.
C. E. HUGHES,
Assistant United States Attorney.
M. C. LIST,
Special Assistant to the United States Attorney,
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

The Government's complaint in this case consists of 18 causes of action, all alleging violations of various provisions of the Federal Safety Appliance Acts and Orders of the Interstate Commerce Commission, issued pursuant to authority contained in these Acts. (Rec. 2.)

For convenience, plaintiff in error is hereinafter referred to as plaintiff, or the Government, and the defendant in error as defendant, or the carrier.

It might be well to state at the outset that in this case the carrier challenges the right and duty of the Government to attempt "to promote the safety of employees and travelers" during the period when certain of its employees were on a strike, and that the

record clearly discloses that, during such period, the *defendant failed to do all that it could reasonably do in the interest of safety.*

There was a verdict for the defendant on all causes of action, *the verdict on the 18th cause of action being directed by the Court.* (Rec. 321.)

Each of the first 12 causes of action involves the movement of a defective car out of Auburn, Washington, on August 31, 1922. These 12 cars were moved out of Auburn in three commercial freight trains of defendant. (Ex. A2, A3, and A4.)

Auburn is a large freight division terminal of defendant (Rec. 40, 69), and during the times in question approximately 2,500 cars a day were moved in and out of that place (Rec. 199–200).

None of the 12 cars was picked up and put in a train that was merely passing through Auburn (Rec. 68), but each of the three trains was a commercial freight train assembled and made up at Auburn (Rec. 68; Ex. A2, A3, and A4), and none of them was in any sense a hospital train (Rec. 233.)

The next five causes of action, 12 to 17, inclusive, involve the movements of five cars in three trains out of Centralia, Washington, another freight division terminal (Rec. 69), and, as in the *Auburn case*, these three trains were commercial freight trains, not hospital trains, each being made up at Centralia (Rec. 69, 233; Ex. A1, A6, and A7).

Both Auburn and Centralia are repair points. (Rec. 40, 199, 208.)

None of the cars involved in this case contained any live stock or perishable freight, and 16 of them were flat cars, either empty or loaded with logs.

Train Extra 1263, engine 1263, left Auburn at 10.20 a. m. (Rec. 40), and included in its 28 cars were the cars referred to in the 1st, 2nd, and 10th causes of action (Ex. A3). Following are shown the cars and defects complained of:

Count.	Car.	Defects.
1.....	N. P. (flat) 67219.....	End handhold missing; violation of Commission's Order. (Rec. 39, 122.)
2.....	N. P. (flat) 61585.....	Uncoupling lever missing; violation of Sec. 2, Act March 2, 1893, as amended. (Rec. 41, 122.)
10.....	N. P. (coal) 58618....	Ladder tread bent flat against side of car; violation of Commission's Order. (Rec. 43, 123.)

Ten of the other cars in this train were loaded with logs; others were loaded with coal, wheat, and sheep. (Ex. A3.)

The 3rd cause of action involves a car (N. P. flat car 68327) moved out of Auburn in train Extra 1616, engine 1616, which left at 10.10 a. m., containing in all 50 cars. (Ex. A4.) The car in question was defective in that the uncoupling lever was missing, a violation of Sec. 2 of the Act of March 2, 1893, as amended. (Rec. 47, 123.)

The remaining eight cars hauled out of Auburn moved from there in a commercial train, No. 930, engine 1784, at 9.50 a. m. This train consisted of 77 cars (Ex. A2), *including 24 bad-order cars* (Rec. 224), but in what respect they were in bad order, defendant

failed to show. The eight cars in question and their defects are shown as follows:

Count.	Car.	Defects.
4.....	N. P. (flat) 66150.....	Hand-brake wheel fouled by lading; violation Sec. 2, Act of April 14, 1910. (Rec. 48, 140.)
5.....	N. P. (flat) 61611.....	Hand-brake shaft bent; violation Sec. 2, Act of April 14, 1910. (Rec. 49, 141.)
6.....	N. P. (flat) 63242.....	Same as count 5. (Rec. 51, 141.)
7.....	N. P. (flat) 68347.....	Side handhold missing; violation of Commission's Order. (Rec. 52, 141.)
8.....	N. P. (flat) 67105.....	Hand-brake wheel missing; violation Sec. 2, Act of April 14, 1910. (Rec. 54, 142.)
9.....	N. P. (flat) 64764.....	Side handholds (2) missing; violation Commission's Order. (Rec. 54, 142.)
11.....	N. P. (flat) 67399.....	Side handhold missing; violation Commission's Order. (Rec. 55, 142.)
12.....	N. P. (flat) 65296.....	Same as counts 5 and 6. (Rec. 56, 142.)

Twenty-nine cars in this train were loaded with logs. (Ex. A2.)

The 13th cause of action relates to a car (N. P. flat car 61753), which left Centralia at 7.40 a. m. September 2, 1922, in train Extra, engines 1261 and 1611. At the time it left an end handhold was fouled by the lading, leaving no clearance, a violation of the Commission's Order. (Rec. 57, 142.) There were 39 cars in this commercial train, including 15 cars of logs. (Ex. A1.)

The 14th cause of action involves a car (N. P. flat car 64036) that was hauled out of Centralia on the same day at 10.30 a. m. in a commercial train, No. 969, at which time it had a broken sill step, a violation of the Commission's Order. (Rec. 59, 142.) There was some contradiction as to the number of the locomotive, but it is immaterial whether it was No. 1263

or 1265. (Rec. 59; Ex. A6.) This train contained 25 cars when it left Centralia. (Ex. A6.)

The other three cars were hauled from Centralia on the same day at 7.15 a. m. in a commercial train, Extra 1672, engine 1672, which consisted of 62 cars. (Ex. A7.) Following are the cars and defects:

Count.	Car.	Defects.
15.....	C., B. & Q. (flat) 90501.	Uncoupling lever disconnected; violation Sec. 2, Act of March 2, 1893, as amended. (Rec. 60, 143.)
16.....	N. P. (box) 24620.....	Lock link of coupler broken; violation Sec. 2, Act of March 2, 1893, as amended. (Rec. 61, 143.)
17.....	N. P. (flat) 63839.....	Hand brake chain broken; violation Sec. 2, Act of April 14, 1910. (Rec. 62, 143.)

The 18th cause of action will be referred to later.

The answer of the defendant (Rec. 20) embodied, 1st, an admission as to its interstate character and movements of the cars in question; 2nd, a general denial to the remaining allegations of each cause of action. This was followed by a so-called affirmative defense to all counts, reading, in part, as follows, the italics being ours:

> * * * that on the 1st day of July, 1922, what are known as the joint shop craft employees, including those engaged in the work of inspecting and repairing cars and the doing of general mechanical work in connection with their upkeep, in protest of an award by the United States Labor Board, a board duly created by an act of Congress of the United States, ceased their employment and withdrew from the service of this defendant.

That said joint shop craft employees so leaving the service of this defendant did so notwithstanding the orders and findings of the United States Labor Board, acting for and on behalf of the United States, and without any fault on the part of this defendant, and that this defendant, pursuant to the directions of said United States Labor Board, proceeded to and used its best efforts toward obtaining other employees to perform the services of those who left its service and went on strike, and endeavored to perform its duties to the shipping public and its other duties as a common carrier, as imposed upon it by the so-called interstate commerce act and the various amendments thereto, and that in so doing it was required to use many of its official staff for the purpose of keeping its railway system in operation and move the various products, perishable and otherwise, tendered to it for transportation, so as to keep the public served by its line of railroad from sustaining irreparable damage and prevent a shortage of food and other necessities, and that as a consequence of the withdrawal of said shop craft employees it was for a period of a number of weeks physically impossible to keep accurate records of the condition of the various cars in the service of this defendant; that all of said cars were properly inspected, and that pursuant to the request as made by the plaintiff, through its duly constituted representatives, this defendant handled its equipment in a reasonable manner and *did not permit any equipment to*

be used which would endanger the safety of operation or of its employees or those having business with this defendant, and that if any of the cars referred to in the plaintiff's complaint were in the condition as referred to therein the same arose as the result of an emergency, and beyond the control of this defendant and without any default on its part, and the defects, if any, were remedied as soon as consistent in view of such emergency and after movements made necessary thereby, at the then nearest most available point therefor.

To this so-called affirmative defense the Government filed a demurrer, which was overruled by the lower Court. (Rec. 30, 31.)

A reply was then filed by the Government, putting in issue certain allegations of this affirmative defense. (Rec. 32.)

Then just before the trial a motion was made by the Government to strike from the answer this affirmative defense, which was also overruled. (Rec. 37.)

The case proceeded to trial. The Government rested its case on the testimony of two inspectors of the Bureau of Safety of the Interstate Commerce Commission. Each of these witnesses testified that he inspected every car in question on at least two occasions and noted their defective condition; that he saw each car leave Auburn or Centralia in the train heretofore referred to, at which time it was still in the same defective condition set forth in the Government's complaint, (Testimony Winter, 37,

and Weeks, 121, 140.) Each inspector made an independent record, concurrently made with each inspection and movement of each defective car, from which he refreshed his memory. (Rec. 69, 114, 122.)

It was soon apparent from the cross-examination of the Government witnesses that the defendant realized that it could not fairly overcome the effect of this clear and positive evidence of the Government; therefore it adopted the policy of attacking the veracity and fairness of these inspectors by suggestive questions not only as to their method of securing evidence but also with respect to certain phases of the strike situation and their sympathies in connection therewith. (Rec. 77, 78, 161, 163, 164.)

This was followed by testimony on behalf of the defendant, practically all of which was not only wholly immaterial but purposely sympathetic and effectively prejudicial.

It was understood at the outset of the trial, and consented to by the Court, that the plaintiff would have an exception to the testimony of each witness of defendant relative to the strike. (Rec. 196.)

Before taking up the many phases of the case we desire particularly to call this Court's attention to certain matters in order that it may be more impressed with the many errors that occurred at the trial, all of which were highly prejudicial:

In no single instance did the defendant attempt to show that it was hauling any car for the purpose of repairing the defects complained of by the Government.

There was some little negative testimony to the effect, and it was defendant's contention, that, excepting as to the 8th count, all the remaining eleven cars hauled out of Auburn *were in good condition when they left in the trains in question.* (Rec. 250, 256, 260.)

As to the 8th cause of action, there was some testimony to the effect that the car was *defective in respects other than that claimed by the Government* (a missing hand-brake wheel), undiscovered by defendant (Rec. 53, 250, 265), *but no contention was made that defendant was hauling the car for the purpose of putting on a new brake wheel, or that such movement was necessary for the purpose of remedying a slight but serious defect of that kind.* In fact, two witnesses of defendant who testified they inspected this car said it did not have a brake wheel missing (Rec. 250, 265).

One of the principal witnesses for defendant, its mechanical superintendent (Rec. 210, 265), testified that they would make a temporary repair of that nature at Auburn even where the car had other defects, although in this respect he was contradicted by another of defendant's witnesses who worked at Auburn. But the testimony on behalf of defendant was significantly silent as to the nature of the "other defects" which it was claimed had to be repaired at some point other than Auburn. This may have been because defendant thought *these other defects were undoubtedly not serious*, for defendant alleged in its so-called affirmative defense that "it did not permit any equipment to be used which

would endanger the safety of operation or of its employees." (Rec. 28.) But no attempt was made to prove such allegation.

As to the *Centralia cases,* there was also some little negative testimony to the effect that the five cars were also in good condition when moved from that place in the three trains in question. (Rec. 130, 275.)

It will thus be seen that if sixteen of the seventeen cars were not defective, as claimed by the defendant, and that if the other car (8th count) was not being hauled, nor had to be hauled from Auburn, for the purpose of replacing a small hand brake wheel, the mass of testimony relative to the strike, the sympathies of the witnesses in connection therewith, the acts of sabotage on the part of strikers and their sympathizers, the I. W. W. atmosphere injected into the case, were all irrelevant, immaterial, purposely sympathetic, and prejudicial.

But to review these errors somewhat in detail:

The defendant attempted to show, over objections, that the Government did not notify certain of defendant's officials that the cars were in bad condition. (Rec. 79.) This was because, in the past, the inspector (witness Winter) had found that such reports did no good. (Rec. 116.) But notwithstanding that, and for the purpose of clearing the atmosphere of any unfairness on the part of the Government witnesses, the Court refused the Government's offer to prove by this same witness that on the same day (August 31st) he inspected about 200 cars; that he found approximately 50 of them

defective; and that he reported the result of that inspection to defendant's officials. (Rec. 117.)

It was then suggested on cross-examination that the witness Winter was sympathetic with the strikers, and that he did not find certain defects but that the same had been pointed out to him by strikers. (Rec. 78.) This was somewhat suggestive, and its purpose seemed plainly apparent; but notwithstanding which, the Court refused to allow the witness Winter to show how long it was after the strike went into effect before he reported any cases against the Northern Pacific for prosecution; and similarly, the Court refused to permit the witness to testify that some of the employees of the Northern Pacific had accused him of being too fair to the company. (Rec. 118.)

The witness Weeks, on cross-examination, was asked if the "company was laboring under any burden at that time in the Centralia yard." And against objections, he replied that there was a strike on. (Rec. 161.)

But the witness Weeks was then compelled, on cross-examination, to go far beyond the rule of reason and evidence and *admit that he had heard* that in the Auburn and Centralia yards, *and in other yards of the Northern Pacific not involved in this case,* acts of sabotage had been committed by strikers or their sympathizers; that is, that after trains had been made up, air hose had been cut, grab irons knocked off, angle cocks damaged, and that the strikers or sympathizers had "otherwise attempted to render the equipment defective." (Rec. 163, 164.)

But for a moment to refer to the 13th cause of action:

This was a car hauled out of Centralia, so loaded with logs that they completely fouled the handhold on the end (Rec. 58, 59, 142); the result was that the handhold had no clearance and the brakeman no protection when coupling and uncoupling cars.

The contention of the defendant was that this car was not defective in that respect; that the Northern Pacific flat cars were so constructed that such a situation *could not* arise; *and that defendant's officials had never heard of such a case.* (Rec. 130, 131, 226, 227, 277.)

But the Court, having admitted such testimony, refused to permit the Government to prove by the witness Winter that prior to that time he had frequently made reports to the Interstate Commerce Commission of flat cars being so loaded with logs as to foul the end handhold; and that at the time of making such reports defendant's Car Foreman and its Inspector of Equipment also took down the numbers of such defective cars in his presence. (Rec. 187.)

As part of defendant's testimony to the effect that the car in the 13th cause of action could not be so loaded with logs as to foul the handhold, witnesses for defendant testified that these cars had six-inch bunks on them, which would raise the logs up; also that the handholds were so applied to the end sill as to prevent such fouling. (Rec. 130, 131, 227.)

But the Court would not allow the Government to prove by several witnesses that during the time this trial was going on they had found a number of

similar flat cars in the Northern Pacific yards with handholds on the ends so applied that they could be fouled by logs; and that one such car was found that morning, June 21st, 1923, at Auburn, so constructed and loaded that a shifting of the logs *as much as one inch* would completely foul the handhold, and that such fact was admitted by defendant's Chief Car Inspector, who accompanied these witnesses. (Rec. 194.)

Then, with full knowledge that it did not intend to prove that any car had to be moved from Auburn or Centralia to repair any appliance complained of, defendant further injected into the case all kinds of testimony, *including hearsay*, relative to the strike situation.

To put some of this irrelevant strike testimony in a nutshell:

The witness Crosby, defendant's mechanical superintendent, testified that the machinists and car repairers, with the exception of a few, went on a strike July 1, 1922; that they had instructions not to hire any outside men; that the inspection and repair work was largely done by the foreman and officers of the road; that on July 18th they started to hire new men; that the men worked long hours; that the men who were accustomed to office work worked night and day, and some of them worked 22 or 23 or 24 hours a day; that the cars were assembled in a train and then inspected; that some time prior to the train moving away the hose was severed; that in one case they had 22 hose cut before the train got out

of Auburn; that in other instances the air hose and steam hose were filled with waste; that the refrigerator cars in Seattle had to be set on the steam track and connected up with steam so as to keep those men (strikers or sympathizers) from filling them up with waste and other foreign substances; that it was a question of endurance so far as the company was concerned. (Rec. 196–198.)

Then to intensify or pyramid this sympathetic, prejudicial testimony, the witness Crosby was required to testify that they did not have sufficient men at Auburn to repair the 20 log cars that left Auburn in one of the trains (train No. 930, also containing eight of the defective cars in question), which 20 log cars were being taken to Renton for repairs (Rec. 198, 199.).

Now, these 20 cars were not involved in this case; but even if material, it was not shown in what respect they were defective, or what repairs were made, *or, more important and germane, if relevant, what repairs were actually needed when they left Auburn, or the place where the defects were first discovered,* which was not Auburn. (Rec. 224.)

Then, well knowing that it was not corroborative of its negative testimony that the cars were not defective, or material to any issue, defendant also proved by the witness Crosby that the reason they made no efforts to employ new men before July 18th was because of a hope or impression that the men would come to their senses and return to work; that defendant's men gave him to understand that

they did not leave because of any dissatisfaction with the company; that the Chairman of the different crafts went back east, either to Chicago or Washington, for the express purpose of making a separate agreement so far as the Northern Pacific was concerned, and that they were refused by Mr. Jewell. (Rec. 200.)

The witness McCullough, then defendant's superintendent, was also permitted to testify that at 10 a. m., July 1st, he was waiting to see what would happen; that at 10 o'clock it did happen; that all the car repairers and inspectors at Seattle, Tacoma, and *Portland* quit; that about two old men stayed at Tacoma, and one at Seattle; that they called in volunteers, who had already been consolidated; that he went to Auburn that day and found only the car foreman and bridge inspector working; that under normal conditions prior to July 1st, and at the time of testifying, there were four regular car inspectors working eight hours, and two or three other men doing light repairing and oiling; that during the strike period and up to August 31st it was a well-known fact and not disguised that train crews were keeping a pretty close eye on the equipment; that they used to tell him about it and try to run a bluff on him about having a large number of cars leaving in a defective condition; that once in a while they would falter around and hold up trains; that some of them were particular about taking a train out if there were any defects; that they (the officers) were par-

ticularly careful to see that everything was fixed, but that the men would still try to find fault; *that he did not see any of the cars involved in this suit; but that the car involved in the 8th count was going to Renton for general repairs,* "together with twenty-three or twenty-four others just like it." (Rec. 216–224.)

Then, along the same line, the witness Crawford was also allowed to testify for the defendant to the effect that at that time the Auburn Terminal was as busy as probably it ever was or ever might be again; that the attitude of the trainmen was most critical; that they departed from their regular path of duty to inspect and examine; that he had seen a brakeman crawl under the cars to find a defect, a thing which they don't do ordinarily and would refuse to do if told to do it ordinarily; that they were most particular to find a defect; that it was not always a defect that amounted to anything; but that if it was anything they could kick about, they took occasion to do so; that the inspection forces consisted almost entirely of the officers; that there was some interference from outsiders; that there was a great deal of interference from people who were apparently employees; that this was in connection with the operation of the air brakes and other matters pertaining to the cars. (Rec. 248, 249.)

Then the witness Burnham was permitted to testify that about that time, August 31st, the attitude of the trainmen was most critical; that they generally did as much inspecting as the others; that their intention was to delay train movements; that crews

held up trains, claiming something was wrong; that this was a common occurrence on train No. 930; that the other brotherhoods seemed to do everything that they could to help the cause of the striking shopmen; that they tried to make it appear that the inspection which was being made was not effective; that the operation of the air brakes was interfered with; that they hindered them in every way possible. (Rec. 254–256.)

Then the witness Alsip testified to acts of sabotage (Rec. 268, 269); also that the situation at Centralia was very critical around September 2d; that they were handicapped in getting help at Centralia because it had a notorious reputation as an I. W. W. center; that when they did get help, they would only dare to put them to work in the daytime (Rec. 274, 275).

Before concluding this statement of the case, we again desire to impress upon the Court the fact that in no single instance was any of the cars involved in the first seventeen causes of action being hauled from Auburn or Centralia for the purpose of repairing any defect complained of. As to the 8th cause of action, *there was not even a mere suggestion by defendant* that the hand-brake wheel could not have been repaired at Auburn; in fact, the defendant did not know that the brake wheel was missing. (Rec. 53.)

Then, forgetting its so-called affirmative defense, defendant introduced evidence to the effect that the hand-brake wheel on the 8th count car was not missing (Rec. 249, 250); and similar testimony was given, on

cross-examination, by another of defendant's witnesses (Rec. 265).

As to the remaining sixteen causes of action, the defendant similarly contended that the cars were not defective, and it is evident that its sole purpose in introducing the irrelevant testimony about the strike, the I. W. W. element, etc., was to becloud the issues, to create sympathy, and to prejudice the Government's case.

But notwithstanding the fact that repairs were being regularly made at Auburn and Centralia; that sixteen of the seventeen cars were claimed to be in good order when hauled out of these points, and that the 8th count car was *not* defective as alleged and was not being hauled for the purpose of replacing a small brake wheel, the Court instructed the jury that it was "authorized to take what the evidence has shown regarding this strike into account in determining whether the movement was necessary for the repair of the cars and *whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective.*" (Rec. 298.)

The 18th cause of action presents a question of law that was passed upon by this Court in the case of *United States* v. *Northern Pacific Railway Company*, decided March 18, 1923, and reported in 287 Fed. 780, which the lower Court, in this case, refused to follow, although we can see no difference between the facts in that and the instant case.

Briefly, the following are the facts with respect to the 18th cause of action:

On September 7, 1922, the defendant received from the Great Northern Railroad, at the interchange track between the two roads in Seattle, a box car loaded with wheat (Rec. 63, 105), destined, as suggested on cross-examination by a question of defendant's counsel, for some point on defendant's line (Rec. 105, 171). Without any inspection of any kind, defendant received this car and hauled it in the defective condition (low coupler or drawbar only 30 inches high) from the interchange track into its Seattle yard, over one-half mile (Rec. 143, 171). This car was in between two other cars, but it was not necessary to move the several cars to the Northern Pacific yard, even had defendant not wanted to accept the defective car in that condition; it could have been switched out on the interchange track (Rec. 107, 108) and turned back to the Great Northern for repairs.

But notwithstanding this state of facts, the Court directed a verdict for the defendant. (Rec. 293.)

Without going into detail, it is sufficient to say that all the defects complained of in the eighteen causes of action were of a serious nature (Rec. 144), which fact was not contradicted.

It is unnecessary now, we believe, to refer to the many errors of the Court in charging the jury, and its failure to give certain instructions requested by the Government; these are set forth in the Assignments of Error, beginning on the following page and will all be discussed later on.

ASSIGNMENTS OF ERROR.

(1) The Court erred in overruling plaintiff's demurrer to the affirmative defense set forth in defendant's answer. (Rec. 30, 31.)

(2) The Court erred in overruling plaintiff's motion to strike from the defendant's answer the affirmative defense therein set forth. (Rec. 37.)

(3) The Court erred in overruling plaintiff's objection to the following question asked of the witness Winter by counsel for the defendant and the answer thereto (Rec. 79):

> Q. Did you ever say anything to Mr. Burnham or any of the other gentlemen there—Mr. Burnham or Mr. Crawford or Mr. Allmain, this gentleman here, or Mr. Alsip, back here—at Centralia about the cars you are complaining about in this case?
>
> A. No, sir.

(4) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff (Rec. 116):

> Q. State whether or not you actually made any inspection of any other cars on this particular occasion and notified any officials there of the defective equipment?

(5) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff (Rec. 118):

> Q. It has been suggested here that there was a strike on and at that time your conduct in reporting these cases for prosecution was not in a spirit of fairness. The strike went

into effect in July, I believe. How long was it after that before you reported any cases against the Northern Pacific for prosecution?

(6) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff (Rec. 118):

Q. Mr. Winter, Mr. Winders asked you if it was not true that to your knowledge some of the men were not loyal to the Northern Pacific and pointed out defects to you upon which you based your prosecution. I am going to ask you to state whether or not it is true that the employees of the Northern Pacific did not accuse you of being too fair to the Northern Pacific?

(7) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Weeks by counsel for defendant and the answer thereto (Rec. 161):

Q. I mean just what I said. Was the company laboring under any burden at that time in the Centralia yard? Any unusual burden?

Q. Was there a strike on in the Centralia yard?

Q. Was there a strike on?

A. Yes, sir.

(8) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Weeks by counsel for defendant and the answer thereto (Rec. 161, 163):

Q. Isn't it a fact that your attention was called to the fact that in the Centralia yard,

the Auburn yard, and other yards of the Northern Pacific, after a train was made up and defects were repaired, either the strikers or sympathizers with the strikers would come along, cut the air hose, and knock off grab-irons?

Q. You have testified that you had learned that there was a strike down at Centralia. I will ask you if your attention was not called, both at Centralia and Auburn—and if you were in the Tacoma yard, and in the Ellensburg Northern Pacific yard, and in Spokane, that after trains had been made up and the road engine had been attached, either the strikers or their sympathizers came along and cut the air hose, damaged the angle cocks, and otherwise attempted to render the equipment defective.

A. I have been told that.

(9) The Court erred in overruling plaintiff's objection to the following question asked of the witness Weeks by counsel for defendant and the answer thereto (Rec. 172):

Q. It is your opinion, Mr. Weeks, knowing the conditions you did know at that time, that it would have been reasonably safe for any man—official or new employees of the Northern Pacific—to go out on that transfer between the street car track and Whatcom Avenue and attempt at that time to have shimmed up or repaired this drawbar?

A. It would have been as safe there as any other place on the road, in my opinion.

(10) The Court erred in refusing to allow the plaintiff to prove by the witness Winter that prior to the time involved in this case he had frequently made reports to the Interstate Commerce Commission of Northern Pacific flat cars being so loaded with logs as to foul the end handhold; that at the time of making such reports the Car Foreman and Inspector of Equipment of the defendant also took the numbers of such cars in his presence. (Rec. 187.)

(11) The court erred in refusing to allow the plaintiff to prove by the witness Winter that on the morning of June 20, 1923, in company with Mr. Pitts, another inspector of the Interstate Commerce Commission, and a Mr. Hazen, defendant's Chief Car Inspector at Auburn, they made an inspection of a number of flat cars similar to the one involved in this case, and that the bunks on same were only four inches in height. (Rec. 193.)

(12) The Court erred in refusing to allow plaintiff to prove by the witness Winter that at the same time and place and in company with the same persons mentioned in Assignment of Error No. 11 they found a car similar to the one involved in this case loaded with logs; that there was just practically three inches clearance between the logs and the handhold, and that if the logs shifted as much as one inch the logs on that car would have completely fouled the handhold on the end of the car, and that this fact was so admitted by defendant's Chief Car Inspector. (Rec. 194.)

(13) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the answer thereto (Rec. 196–198):

> Q. I wish you would state to the jury briefly and clearly so they can hear you the conditions confronting the operations of the Northern Pacific so far as its equipment was concerned, so far as inspectors and car repairs were concerned, from the 1st of July up to the 2nd of September, with particular reference to Auburn and Centralia.
>
> A. On the first of July, as practically everyone knows, and of course railroad men better than anyone else, the railroad employees right down to the wipers went out—I think in Seattle a few wipers remained. So far as the car repairers and mechanics and everything of that kind is concerned, they walked off the job. We had instructions not to hire any outside men, and as a result of that it devolved on the officers and men, the few who remained—of course the foremen, car foremen, in practically all cases remained to work. They did at Auburn and at points where Mr. Winter has mentioned. Besides the foremen, the work was largely done by other officers of the railroad. That condition continued up until July 18, when we started to hire a few men, the best, of course, that we could secure. But, as you all know, the men that we could hire under those conditions were not like the men that ordinarily do that work. However, we did

get some good men after a while. We struggled along and did the best we could with what we had to do it with. The men worked long hours. The men who were accustomed to office work worked night and day, and some of them worked 22 or 23 or 24 hours a day; couldn't work any more than that. We worked along in that way. Now, I have heard some matters brought out here in connection with the inspection of trains that really seemed inconsistent to me, in that the cars were not inspected in the way that they were ordinarily inspected when we have the regular organized force of inspectors. That was true. We did not have the men to do it. The cars were assembled in the train, and they were inspected by these officers that I have mentioned. Sometimes prior to the train moving away—as has been brought out here—the hose were either severed—generally I will say they were stabbed with a knife blade, not cut in two, just a knife blade inserted—and in one case we had 22 hose cut before we got out of Auburn. In other instances we had to go around—the hose were filled with waste, both the air hose and the steam hose. The refrigerator cars here in Seattle we had to set them on the steam track and connect them up with steam so as to keep those men from filling them up with waste and other foreign substances. Taking the whole matter, it was a question of endurance so far as the Company was concerned. Everybody was working the constitutional limit. Every nerve was strained. There is

no question about that. I don't know of anything that could have been done that was not done with the force available.

(14) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the answer thereto (Rec. 198, 199):

Q. On the 31st of August, the evidence will show, on train leaving Auburn as was testified at 9.50—as a matter of fact it registered out at ten—he had on that twenty log cars in defective condition taking them to Renton to be repaired at the Renton car works. Did we at that time on the 31st of August have men available to put them in condition at Auburn?

A. I would say no. We did have men but not sufficient.

(15) The Court erred in overruling plaintiff's objections to the following questions asked of the witness Crosby by counsel for defendant and the replies thereto (Rec. 200, 201):

Q. Now, Mr. Crosby, when was it that the Northern Pacific—or was there any particular reason why the Northern Pacific did not start to hire any men until about the 18th of August—18th of July, I should say?

A. Our purpose for not employing men was by reason of our having the hope or an impression that the men would come to their senses and return to work. Our men who left the service did not do so because of any dissatisfaction that they had with the North-

ern Pacific. That is, they all gave me to understand that. I am pretty close to the workingmen.

Q. Was there any of these men went back East at that time, Mr. Crosby, or not?

A. The chairman of the different crafts. I don't know just how many of them went either to Chicago or Washington for the express purpose of making a separate agreement in so far as the Northern Pacific was concerned and were refused by Mr. Jewell. I was looking up some letters on that. I did not have time before I left the office. We have it on record.

Q. It was not until after those men returned that you tried to hire outsiders?

A. I can't remember the date that they went down; I would not want to testify on that. I don't believe that we did.

(16) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the reply thereto (Rec. 201):

Q. Was the situation such in Seattle, Mr. Crosby, that you would have permitted any of the officials of the Northern Pacific or any new employees of the Northern Pacific to attempt to make any repairs to cars on this transfer track along Whatcom Avenue, having the standpoint of the safety of the men and the safety of the equipment and the property in mind?

A. No; I would not expect men to work there. I never send men to do what I would not care to do myself. I would not care to work there myself.

(17) The Court erred in overruling plaintiff's objections to the following question asked of the witness McCullough by counsel for defendant and the answer thereto (Rec. 215, 216):

> Q. On July 1st what were you doing?
>
> A. On July 1st at 10.00 a. m. I was waiting to see what would happen. At 10.00 o'clock it did happen. Everybody quit—all the car repairers, inspectors taking cars of the equipment at Seattle, Tacoma, and at Portland. I believe about two old men stayed to work at Tacoma. I believe one at Seattle. Then we made the necessary arrangements; we called in volunteers. We had them already consolidated. We got in touch with them and kept our King Street station working and getting our passenger trains out of town. That is the first thing that we did that afternoon. The next morning I got over into Auburn and Kent. I found the situation over in Auburn—I went out there July 1st and I found the car foreman and the bridge inspector the only two men working in the yards inspecting trains.

(18) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answer thereto (Rec. 216–218):

> Q. You were familiar with the conditions in Seattle and Auburn up to the 31st of August, were you, Mr. McCullough?
>
> A. Yes, sir.
>
> Q. When was it that the company first started to employ new men?

A. We were directed to not do it, and I think that ban was lifted on either July 18th or 21st. I am not positive. I believe it was July 18th.

Q. Just tell the jury now, up to August 31st, what the conditions incident to and surrounding the operation of the Auburn yards were with reference to the inspection of trains and the making of repairs at that point, and in what way it was different from normal?

A. Under normal conditions and prior to July 1st, and at the present time, there are four regular car inspectors working eight-hour shifts, and two or three other men doing light repairing and oiling, and so forth. Probably somewhere between 20 and 25 men employed at Auburn inspecting cars and making light repairs and taking care of oiling boxes.

Q. When with reference to the cars being put on the train are these repairs made?

A. Normally?

Q. Prior to the strike; and now.

A. Most all of the repairs were made on the repair track, except small defects which inspectors would find.

Q. You are talking about during the strike period?

A. No; now.

(19) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answers thereto (Rec. 219, 220):

Q. During this same period up to August 31st, what is the fact as to whether or not

these train crews were keeping a pretty close eye on the equipment?

A. That was a fact that was well known and not disguised. They frequently used to tell me about it and try to run a bluff on me about having a large number of cars leaving in a defective condition. I asked them to give me the car numbers, and told them if they found any cars defective I would be very glad to have them show me. I told that to the chairman of the Brotherhood Committee.

Q, Would they sometimes hold up the trains?

A. Once in a while they would falter around there about something.

Q. Were they particular about refusing to take the train out if there were any defects?

A. Oh, yes. Not all of them. Certain men. We would be particularly careful to see that everything was fixed. They would still be trying to find fault.

Q. These questions that I am asking you are general questions. You did not see those particular cars yourself, did you?

A. You mean that the suit was brought on?

Q. Yes, sir.

A. No, sir. I might have seen them at other dates.

(20) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough with respect to car No. 67105 and the answer thereto (Rec. 223, 224):

Q. That is the eighth cause of action. What was the condition of that car when it left Auburn?

Q. Why was it going to Renton?

A. For general repairs together with twenty-three or twenty-four others just like it.

(21) The Court erred in overruling plaintiff's objection to the following question asked of the witness McCullough by counsel for defendant and the answer thereto (Rec. 226):

Q. What efforts had you used toward getting men at Auburn for the purpose of keeping equipment in repair and keeping commerce passing through there moving?

A. After we were authorized to employ men almost everything was done to secure them; through advertising, men personally sent to different places—I think we sent one man to Los Angeles or San Francisco, I don't know which—men were shipped in from all parts of the country. We had an office open in the Arcade Building in Seattle. Every newspaper carried one or more advertisements. We would hire any man, didn't care what he was, to go out and get some of the work done.

(22) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answers thereto (Rec. 229):

Q. Supt. McCullough, being familiar with the situation that existed in Seattle on the 31st day of August—or rather on the 7th day of

September—would you say that it would be reasonable to have attempted to make repairs of any character upon that transfer track, located, as it was, in the public street and not on the property of the company, and between the street car track and the paved portion of Whatcom Avenue?

A. It would be very unsafe, unless the men doing the work were heavily guarded.

Q. Would it, in your opinion, knowing the situation and the obligations of the company to the city and the officials of the city and the government—would it have been countenanced by anyone exposing the men out there at that time for the making of repairs?

A. My impression is it would not.

Q. As a matter of fact, at that time the United States was trying to furnish protection, was it not?

A. Yes, sir; and we refrained from putting even inspectors out there. It was one of the last things that we would have done, because we did not want to put them there. We were afraid.

(23) The Court erred in overruling plaintiff's objection to the following question asked of the witness Crawford by counsel for defendant and the answer thereto (Rec. 248, 249):

Q. What was the situation out there around about the 1st of September? Just tell the jury with reference to the work and with reference to the trains going out, and the conduct of the conductors—of some of the conductors—and

brakemen in taking out their train. You were there. Tell them.

A. In the first place, we were doing a very large volume of business. The Auburn terminal was as busy then as probably it ever was or ever may be again. The attitude of the trainmen was most critical. I mean by that that they departed from their regular path of duty to inspect and examine. I have seen a brakeman crawl under the cars to find a defect, a thing which they don't do ordinarily, and would refuse to do if they were told to do it ordinarily. So that, in addition to our inspection, which was close, we had the assistance in that way of the conductor and his three brakemen. And, as I say, they were most particular to find a defect. It was not always a defect which amounted to anything; but if it was anything they could kick about, they took the occasion to do so, and we either repaired the car without dispute or carded it "bad order" and had it sent out of the train. The inspection force consisted almost entirely of the officers of the company, and there was some interference from outsiders—a great deal of interference from people who were apparently our employees— in connection with the operation of the air brakes on the train and other matters pertaining to the cars.

(24) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Burnham by counsel for defendant and the answers thereto (Rec. 254–256):

Q. What was the attitude along about the 31st of August of the train crews with reference to taking out trains? Was it critical or otherwise?

A. They were very critical. As a matter of fact, the train crews generally did as much inspecting as we did. The intention was to delay the movement of trains as much as possible. That was the impression we gained—the only impression that we could gain after what we saw they were doing.

Q. At that time were your trains being held up by these crews claiming something was wrong?

A. Yes, sir.

Q. Was that a common occurrence?

A. That was a common occurrence on train 930.

Q. That is, this train that went out of Narco?

A. Yes, sir.

Q. Just tell the jury about what conditions were around there at that time, Mr. Burnham.

A. The other brotherhoods seemed to do everything that they could to help the cause of the striking shopmen. That is, they tried to make it appear that the inspection which was being made by the men that were there was not effective, and they even went so far as to cut the hose after we had—I will have to explain that first before I get into that. The first thing we did, we asked the engineer to apply the air. Then we went along the train and made an inspection of the hose to see if there was any leaky hose or anything

else that might appear. Then we asked the engineer to release the air. We would find in some cases that after the air had been applied angle cocks had been turned, or sometimes if we happened to be in the center of the train—a train of 75 cars—some way or other the angle cocks at the rear of the train were opened up so the brakes were not effective. As a matter of fact, they hindered us in every way possible.

(25) The Court erred in overruling plaintiff's objection to the following question asked of the witness Alsip by counsel for defendant and the answer thereto (Rec. 268, 269):

Q. What were the conditions on that date, that is, the surrounding conditions, as to—well, as to your safety at night, and what was being done to your equipment after you had it examined and attempted to repair it?

A. I think probably we had as much interference at Centralia as any other one place in the Northwest territory. First of all, Centralia is a notorious place, as you know. We were continually interfered with in making up our trains and inspecting our trains and connecting the air. Even after we had passed one of our trains and given the engineer the signal to set the air and release the air we have found and been notified in some cases of malicious acts on the part of unknown persons which resulted in defects such as we are talking about now—cutting levers disconnected, air hose cut or pulled apart, and in some instances the stirrups were bent off by

the use of bars, same as we would use in straightening and opening the angle cock to prevent our getting a full air pressure. And numerous other things such as Mr. Crosby spoke of—waste being placed in the hose, and the gaskets taken out, and numerous other things.

(26) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Alsip by counsel for defendant and the answers thereto (Rec. 274, 275, 288):

Q. I don't know whether I asked you or not, but how were you being treated along this time when things got very critical about the 2nd of September by the train crews when taking out their trains? Were they particular about the condition of their equipment when it went out of Centralia?

A. They were giving the trains as good an inspection as we could possibly give them, and they had instructions from their various officers—their organizations—to take records and report any cars that were not in shape and also to refuse to take them. In many cases they would delay the trains. I have seen trains in Centralia delayed as high as one hour waiting for some of us to come and make some minor repair or to have a car set out, and in some instances I have had to use this particular crew that was objecting to the condition of the car to make a set-out of the car, because the switch engines were not available. The situation—the condition was very critical, especially at

Centralia. That is borne out by not only the records but the news items during that time that we were not able to get help at Centralia, largely for the reason that Centralia had a notorious reputation as an I. W. W. center. While a great many other points were supplied with help, we could not get men to go to Centralia. When we did, we only dared to put them to work in the daytime. That left Mr. Nixon and myself to work in the nights continuously. In fact, I was not released at Centralia until October 12th. I was continually in service from July 1st to October 12th. Only by the aid of my automobile we were able to keep up with the game.

Q. You knew the men that you were able to get?

A. I know we were having a great deal of difficulty to get any men to go to Centralia at that time by reason of the I. W. W. and other elements that seemed to infest that particular locality.

(27) The Court erred in refusing to allow the witness Weeks to answer the following questions asked by counsel for plaintiff (Rec. 292):

Q. Mr. Weeks, some question has been brought into this case by some of the witnesses, particularly Mr. Alsip. He said these cars were not equipped with handholds on the end of the flat cars so that they could come up to less than two inches from the top of the floor. I am going to ask you to state if you recently made any inspections of any flat cars for the

purpose of seeing whether they were equipped with handholds that come up to less than two inches from the top of the floor.

Q. I want to make it a little more definite. I am going to ask the witness one more question. Mr. Weeks, state whether or not yesterday morning you inspected a number of flat cars in the yards of the Northern Pacific for the purpose of ascertaining whether or not the handholds on the ends were applied at the top so that they could be fouled by lumber or logs.

(28) The Court erred in that part of its charge to the jury, wherein it said (Rec. 298, 310):

There has been considerable said in the evidence and in the argument regarding the effect of the strike. You are authorized to take what the evidence has shown regarding this strike into account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective. You can readily comprehend that in establishing a railroad every station does not have to be a repair point for all purposes or for the purpose of repairing all kinds of defects. If the railroad had established at division stations and other points facilities for making repairs, and the strike came along and rendered some of them unavailable, they would cease to be available repair points by reason of the strike; that is, it would not only be necessary to have tracks and shops, tools, equipment, and ma-

chinery; and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points, and it would not be a violation of this law to move a car to a repair point and remedy the defects where that condition did not exist, or was not so acute, or where the friction was not so great.

(29) The Court erred in that part of its charge to the jury wherein it said (Rec. 299, 312):

> A strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. It works both ways.

(30) The Court erred in that part of its charge to the jury wherein it said (Rec. 308, 312):

> If the inspection is made within a reasonable time before the train leaves and the company—the defendant—has no reasonable apprehension that there is any movement of the train or that it is subjected to any condition that is going to put it out of repair after inspection before it has left, if mischievous individuals for any reason after that inspection

> inflict defects or damage upon the cars that result in penalty defects, the company would not be liable, if it did not discover them until it was out on the line, unless the circumstances were such as to render them so glaring that they could not be overlooked in the exercise of that high degree of care to which they are bound by the Act.

(31) The Court erred in that part of its charge to the jury wherein it said (Rec. 309, 312):

> After the inspection, if it is made a reasonable time before the departure of the train, the train should be considered as upon the line, and the defendant would not become liable if it exercised that degree of care that I have indicated until it did discover the defects, when it would then again be its duty to repair wherever found if they could be repaired there; if they could not be repaired, then to take them to the nearest available repair point and remedy the defects.

(32) The Court erred in refusing to direct the jury to return a verdict in favor of the plaintiff on the eighth cause of action, same being included in plaintiff's request for Instruction No. 1 (Rec. 313):

> The Plaintiff requests the Court to direct a verdict in its favor on each of the 18 causes of action, this motion to apply separately as to each cause of action.

(33) The Court erred in refusing to direct the jury to return a verdict in favor of the plaintiff on the eighteenth cause of action, the same being

included in plaintiff's request for Instruction No. 1 (Rec. 313):

> The Plaintiff requests the Court to direct a verdict in its favor on each of the 18 causes of action, this motion to apply separately as to each cause of action.

(34) The Court erred in refusing to submit the eighteenth cause of action to the jury, as requested by the plaintiff by its request for Instruction No. 2 (Rec. 314):

> In the event the Request No. 1 is refused as to any cause of action, Plaintiff requests the Court to instruct the jury as follows with respect to such cause of action.

(35) The Court erred in directing a verdict for the defendant on the eighteenth cause of action and entering judgment thereon. (Rec. 293, 313.)

(36) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 5 [3] (Rec. 313, 314):

> If the jury believes, from a fair preponderance of the evidence, that any car was hauled by defendant from Auburn, or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.

(37) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 8 (Rec. 313, 314):

> It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to

inspect and repair the cars involved in this case.

(38) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 9 (Rec. 313, 314):

> The provisions of the safety appliance acts are of such nature that they can not be ignored or set aside by a carrier on the ground that a strike has interfered with its operations. But the safety of other employees, those who operate trains, as well as the traveling public, is to be placed above the question of inconvenience to the carrier of keeping its equipment in repair.

(39) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 12 (Rec. 313, 314):

> In order to comply with the spirit of the law, the defendant can not establish a division terminal and make up trains at such terminal and haul in such trains, cars with defective safety appliance, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repairmen at Auburn, or Centralia, hauled any of the cars from these points, in road service, in the condition complained of by the Government.

(40) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 13 (Rec. 313, 315):

> As to each of the cars hauled from Auburn or Centralia, the jury must return a verdict

for the Government unless the defendant has shown—

1st. That such car had been properly equipped with the appliance prescribed by the Act of Congress and the Orders of the Interstate Commerce Commission.

2d. That the defective equipment became defective while being used by the defendant on its line of railroad.

3d. That the defendant, through its officers or agents, had discovered the defects.

4th. That the defendant was hauling the car for the sole purpose of putting it in repair, and that such repairs could not be made at Auburn or Centralia.

5th. That such car was actually repaired at the nearest available point from Auburn or Centralia.

(41) The court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 14 (Rec. 313, 315):

> The jury must not return a verdict for the defendant on any cause of action, unless it appears that the defective cars were hauled by themselves for repair, or hauled in what is known as a hospital train. Good order and bad order cars can not be assembled together in a train and hauled from a terminal, some for repair and some in commercial service. And the burden is on the defendant to show that this was not done.

(42) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 15 (Rec. 313, 315):

The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, can not be considered as an excuse for not repairing the defective equipment in question.

(43) The Court erred in instructing the jury as follows, the same being substantially defendant's request for Instruction No. 8 (Rec. 316):

By its eighth cause of action the Government has alleged that, in the violation of the Act of Congress therein referred to, the defendant moved its own freight car from its Auburn yard with the hand-brake wheel missing. The defendant admits that this particular freight car, being its own car No. 67105, was in a defective condition and alleges that the same was being transported empty to Renton for the purpose of being placed in repair, and I instruct you that under the Act of Congress, which is the foundation of the several causes of action in the plaintiff's complaint, it is provided that where railroad cars have become defective or insecure, while such cars are being used by a carrier on its own line railroad, that then such car after the discovery of such defect may be hauled from the place where it was first discovered to be defective or insecure to the nearest available point where such car can be repaired; if such movement is necessary to make such repairs and such repairs can not be made except at such repair point, that this can be done without liability for the penalties imposed under the terms of such

act. It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton, if it was so hauled, for the purpose of causing it to be repaired, and by "necessary" I do not mean that you must find that it was impossible to repair this car at Auburn, but if you believe that the only practicable method, under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired, and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, then I instruct you that the movement thereof by the defendant for such purpose was not a violation of the law; and if you so find, your verdict should be for the defendant on this cause of action.

(44) The Court erred in instructing the jury as follows, the same being substantially defendant's request for Instruction No. 11 (Rec. 316, 318):

It is alleged, and it is an admitted fact, that the defendant is an interstate carrier of freight and passenger for hire, and as such it was its duty, as a matter of law, during the period referred to in the several causes of action herein, to use every reasonable effort to perform its duties as a common carrier of freight and passengers. The defendant by its answer has alleged that at said period, and without fault on its part, certain of its

employees had left its service in protest against certain orders and directions made by the United States Labor Board, and that among such employees were its car inspectors and car repairers, and that in order to perform its duty to the public it was, pending its ability to obtain other employees, necessary that it use many of its other officers and employees for such purpose, and that by reason of the circumstances and conditions surrounding the withdrawal of such employees it did not have available the repair facilities that it would have otherwise had, but that it did make all repairs necessary to comply with the Act of Congress referred to and the regulations issued pursuant thereto as alleged in the several causes of action herein, and I instruct you that it was the duty of the defendant railway company to use its best efforts to keep the commerce of the country moving; and in determining the disputed questions of fact in this case that you have a right to take into consideration the surrounding circumstances and conditions as they existed at the times alleged in the complaint herein insofar as the same have been established by the evidence. While the fact of such withdrawal of certain of its employees from its service would not authorize it to violate the Act of Congress and the regulations issued pursuant thereto under which this action is brought, you would be authorized in considering the evidence to take into consideration such surrounding conditions for the purpose of determining the issues submitted to you and the evidence in connection therewith.

QUESTIONS INVOLVED.

1. Did the trial Court err in overruling plaintiff's demurrer to defendant's affirmative defense and in refusing to strike same from the answer? (Assignments of Error 1 and 2. See page 20 hereof.)

2. Did the trial Court err in admitting certain evidence offered by defendant and objected to by plaintiff, or in refusing certain evidence offered by plaintiff and objected to by defendant? (Assignments of Error 3 to 27, inclusive. See pages 20–37 hereof.)

3. Did the trial Court err in instructing the jury as set forth in Assignments of Error 28 to 31, inclusive? (See pages 38–40 hereof.)

4. Did the trial Court err in refusing to direct the jury to return a verdict for the plaintiff on the 8th cause of action? (Assignment of Error 32. See page 40 hereof.)

5. Did the trial Court err in refusing to instruct the jury, as requested by the Government, and set forth in its Assignments of Error 36 to 42? (See pages 41–43 hereof.)

6. Did the trial Court err in instructing the jury, as requested by the defendant, and set forth in Assignments of Error 43 and 44? (See pages 44–45 hereof.)

7. Did the trial Court err in refusing to direct the jury to return a verdict for the plaintiff on the eighteenth cause of action? (Assignment of Error 33. See page 40 hereof.)

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8. Did the trial Court err in directing a verdict for the defendant on the eighteenth cause of action and in refusing to submit same to the jury? (Assignments of Error 34 and 35. See page 41 hereof.)

The above questions are properly grouped and discussed on the pages referred to, and for that reason it is deemed unnecessary to set them out here in detail.

THE ACTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

An Act To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers, and for other purposes.

[Sections 2 and 4, Act of March 2, 1893 (27 Stat. at L. 531), as amended by Act of April 1, 1896 (29 Stat. at L. 85).]

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. (Counts 2, 3, 15, and 16.)

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to

men in coupling and uncoupling cars. (See Order of Commission, pages 51–52 hereof.) (Counts 1, 7, 9, 11, and 13.)

Section 1 of the Act of March 2, 1903 (32 Stat. at L. 943) extended the provisions of the earlier Acts to apply to cars used on any railroad engaged in interstate commerce.

Supplementary Act of April 14, 1910 (36 Stat. at L. 298):

> SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line, any car subject to provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards; * * * (See Orders of Commission, pages 51–52 hereof.) (Counts 4, 5, 6, 8, 10, 12, 14, and 17.)
>
> SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three; * * * and thereafter said number, location, dimensions, and manner of application as designated by said Commission

shall remain as the standard of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory * * * and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign commerce which does not comply with the standard so prescribed by the Commission. (See Orders of Commission, pages 51–52 hereof.) (Counts 1, 7, 9, 10, 11, 13, 14, and 18.)

SEC. 4. * * * *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the

place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; * * * and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains, or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

ORDERS OF INTERSTATE COMMERCE COMMISSION.

It is unnecessary to set out in full the standards of equipment prescribed by the Order of the Commission of March 13, 1911; but the substance of this Order, in so far as it relates to the instant case, provides that cars shall be equipped as follows:

END HANDHOLDS ON FLAT CARS (counts 1 and 13):

Number required: Four (4).

Dimensions: Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: Horizontal—One (1) near each side of each end of car on face of end sill.

SIDE HANDHOLDS ON FLAT CARS (counts 7, 9, and 11):

Number required: Four (4).

Dimensions: Same as end handholds.

Location: Horizontal—One (1) on face of each side sill near each end.

SIDE LADDERS ON HIGH SIDE GONDOLAS (count 10):

Number required: Two (2).

Maximum spacing between ladder treads: Nineteen (19) inches.

Minimum clearance of ladder treads: Two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) on each side, not more than eight (8) inches from right end of car.

SILL STEPS ON FLAT CARS (count 14):

Number required: Four (4).

Dimensions: Minimum length of tread, ten (10), preferably twelve (12), inches.

Location: One (1) near each end on each side of car.

Tread shall not be more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

The Order of the Commission of October 10, 1910, in re Standard Heights of Drawbars, involved in the 18th cause of action, provides that—

> the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to wit: The maximum

height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the center of drawbars for standard-gauge railroads in the United States subject to said Act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31½ inches. (Count 18.)

This Order became effective December 31, 1910.

ARGUMENT.

QUESTION INVOLVED—NO. 1.

ASSIGNMENTS OF ERROR 1 AND 2.

In order to bring itself within the Proviso of the Safety Appliance Act, a carrier must show, and therefore plead, among other things—

(*a*) *That the car became defective while being used by it upon its line of railroad.*

(*b*) *That it could not be repaired at the point where its defective condition was first discovered.*

(*c*) *That it was only hauled from the point of discovery to the nearest available point where it could be repaired.*

(*d*) *That such movement was necessary to make such repairs.*

It is well settled that the purpose of a Proviso, ordinarily, is to restrain or modify the enacting clause of a statute.

United States v. *Dickson*, 15 Pet. 141.
Schlemmer v. *B. R. & P.*, 205 U. S. 1.

Excuses embodied in the Proviso are separate and affirmative defenses.

> *C., B. & Q.* v. *United States*, 8th C. C. A.; 195 Fed. 195.

These excuses must be particularly pleaded; and the burden is on the defendant to sustain such allegations.

> *United States* v. *K. C. S.*, 8th C. C. A.; 202 Fed. 828.
>
> *United States* v. *T. & B. V.*, 5th C. C. A.; 211 Fed. 448.

There is every good reason for such a rule; for, just as the plaintiff is required to show, or allege in its declaration, the actual movement complained of, as well as the number and initials of the car and its defects, in order that defendant may know what it is charged with and what it has to meet, so should the defendant be required to plead with particularity those things peculiarly within its knowledge—that is, the place of discovery of a defect, the place of repair, the availability of the latter to the former, and the necessity for such movement. Only in this way can the Government be acquainted with what it has to meet.

If, in the instant case, there was a real, bona fide intention on the part of the defendant to bring itself within the Proviso, it should have done so. It can hardly be suggested, much less urged, that, because of a lack of knowledge, it would be a hardship on the defendant *in the instant case* to frame its answer with such definiteness and particularity, for the record dis-

closes the fact that all train crews were, by rule, required to inspect their trains at every opportunity, even when taking coal or water or waiting for other trains, and make a record of cars found defective (Rec. 238), and that this rule was enforced and not winked at (Rec. 274).

Defendant can not well plead ignorance of the law in this respect, for this Court, on March 12, 1923, in a decision in case No. 3909, *United States* v. *Northern Pacific Railway*, 287 Fed. 783, so construed the Proviso in question as to leave no doubt on this question.

As in that case (No. 3909), so in this case, the defendant has not "conformed to the mandate of the Proviso."

And, without taking up any unnecessary time, we desire very briefly to call the Court's attention to the fact that there is another reason why plaintiff's demurrer should have been sustained or the motion granted to strike from the answer the so-called affirmative defense.

An affirmative defense can not be pleaded *unless the car was actually defective, its defective condition actually discovered, and its movement being for the express purpose of remedying such defects.* But how can such conditions exist if a car, as a matter of fact, is not defective? In its general denial the defendant pleaded that each car was not defective; then in its so-called affirmative defense it attempted to plead that the cars were defective and were being

hauled for repair. These defenses are too inconsistent to warrant further discussion.

As was said in the case of *State National Bank* v. *Carter*, 13 Wash. 281; 48 L. R. A. 177:

> And even in those States allowing inconsistent defenses to be pleaded, it is doubtful whether a defendant would be allowed to plead and rely on two defenses *so inconsistent that if one is true the other must be false.* (Italics ours.)

For the reasons above stated, the Court should have sustained plaintiff's demurrer to defendant's affirmative defense and granted the motion of plaintiff to strike same from the answer.

Questions Involved—No. 2.

Assignments of Error 3 to 27.

This question relates to the admissibility of immaterial testimony and the rejection of certain relevant testimony.

Owing to the importance of the several questions raised in connection therewith, and the many errors which the Government believes are disclosed by the Record, the Assignments of Error will be discussed either separately or grouped, according to the subject matter, when this can be conveniently done.

(*a*) *The Government is not required to report to railway officials the condition of equipment found on their line, and it was error to require a witness, under the circumstances shown by the Record in this case, to answer a question of such character*— (Rec. 79).

1st. *Because the law imposes upon a carrier the duty of inspecting and repairing its own cars.*

2d. *Because it opens the door to irrelevant arguments, and unless explained or qualified, might becloud the issues and mislead the jury.*

(ASSIGNMENTS OF ERROR 3 AND 4.)

For many years carriers have attempted to defeat prosecutions of this kind on the ground that the violations must be willful and deliberate; in other words, they have contended that before the Government can successfully proceed with such a case, it must first notify the carrier that certain defective equipment is in its yards, and then observe that carrier deliberately disregarded such knowledge and haul the car away in such condition.

But the Courts have uniformly rejected such impossible construction of the Act.

N. & W. v. *United States,* 4th C. C. A.; 191 Fed. 302.

C. B. & Q. v. *United States,* 8th C. C. A.; 211 Fed. 12.

C. & O. v. *United States,* 6th C. C. A.; 249 Fed. 805.

Now, the purpose of the question asked the witness Winter (Rec. 79; Assignment of Error 3) is plainly apparent, especially when the Court notes the unwillingness of the defendant to allow the witness to explain to the jury his reasons for not notifying defendant's officials of these particular cars, for an objection was interposed to such question (Rec. 116).

This objection was overruled, and the witness replied (Rec. 116):

> Well, a good many times, as in this case, we find that it does not do any good.

It is true that the Court charged the jury that the Government Inspectors were not required to notify railroad officials of equipment they had found defective (Rec. 300); but the question of possible unfairness of the witness having been injected into the case by defendant, and over the Government's objections, the Court should have permitted the witness Winter to show that he had been more than fair, for note the offer of proof (Rec. 117) in connection with the question forming the basis of Assignment of Error 4:

> Mr. List. I offer to prove by this witness that on August 31 he reported to one of the officials of the Northern Pacific of having inspected about two hundred cars and having found approximately fifty of them in a defective condition; and that he gave to the Northern Pacific official the record showing the individual numbers of those cars defective.

This was a sufficient preliminary question for the subject matter intended.

And, further, on this question of fairness, which it is requested will be considered in connection with this phase of the case, the Court's attention is called to subdivision (*b*) page 59 hereof.

The Court erred in requiring the witness Winter to answer the question relative to his failure to notify

defendant's officials of the particular cars in the instant case.

But, after requiring such question to be answered, and after it became apparent that the question of the witness's fairness had been injected into the case by defendant, the Court further erred in not permitting the Government to show that the witness had been fair (Rec. 118).

(*b*) *The Court erred in refusing to permit the witness Winter to testify to certain facts for the purpose of showing that he had been more than fair with the defendant, which questions to that end were only asked the witness after his veracity and fairness had been injected into the case by defendant* (Rec. 118).

(ASSIGNMENTS OF ERROR 5 AND 6.)

A perusal of the Record will show that the carrier's defense in this case, aside from camouflaging the issues, was to attack the veracity and fairness of the Government Inspectors for doing their duty.

This attitude was shown early in the cross-examination of the witness Winter, for we find the following reply to a question asked by counsel for the defendant (Rec. 77):

> We tried the brake when we inspected the car and noticed the condition of the car. And when it left in the train at 9.50 it was in the same condition.

And immediately the defendant showed part of its intended defense, as will be seen by this remark of counsel to the witness (Rec. 77):

Of course, you understand that in order to get a conviction you have to testify to that.

Then, further, as part of its plan of trying the case on irrelevant issues, we find the following questions asked the witness Winter (Rec. 77, 78):

Mr. WINDERS. At that time there were some of these trainmen—I don't say all, or the majority of them—but a few of the trainmen working for the Northern Pacific and the other railroad companies that were not out on strike that were quite active in trying to help the strikers out?

(Government's objection overruled.)

Mr. WINDERS (continuing). There was a stray man or two that was not any too loyal to the railroad?

WITNESS. I would say generally——

Mr. WINDERS. I didn't say generally. I have a great deal of pride in the employees of the Northern Pacific; but I say there were a few stray ones that were not very loyal, that were trying to help make things as miserable as they could in the operation of these yards; isn't that true?

(Government's objection sustained.)

Mr. WINDERS. Is it not a fact, Mr. Winter, that there were continually tales being carried to you and to Mr. Weeks (the other Government inspector) from men who were drawing salaries from the Northern Pacific and from other corporations, complaining about the equipment?

WITNESS. Yes, sir.

Mr. WINDERS. Did any of these men tell you—referring to this fifth cause of action—that this particular brake staff was bent?

WITNESS. No, sir.

Following this, all through the cross-examination of the witness Winter were references in questions of counsel relative to the "strike period."

The above line of questioning, particularly the last question, is very significant in connection with defendant's desire to try the case on sympathetic, prejudicial testimony, wholly immaterial and irrelevant; *for the Record clearly discloses the fact that defendant claimed that it had inspected this car (fifth cause of action) and that it was not defective when it left Auburn.* (Rec. 249, 250).

And after all this the Government was refused the right to show that the witness had been very, very fair, for objections to the following questions were sustained (Rec. 118; Assignments of Error 5 and 6):

Mr. LIST. It has been suggested here that there was a strike on and at that time your conduct in reporting these cases for prosecution was not in a spirit of fairness. The strike went into effect in July, I believe. How long was it after that before you reported any cases against the Northern Pacific for prosecution?

(Objection by defendant sustained.)

Mr. LIST. Mr. Winter, Mr. Winders asked you if it was not true that to your knowledge some of the men were not loyal to the Northern Pacific and pointed out defects to you upon

> which you based your prosecution. I am going to ask you to state whether or not it is true that the employees of the Northern Pacific did not accuse you of being too fair to the Northern Pacific?
>
> (Objection by defendant sustained.)

As a matter of fact, the witness *Weeks* was so fair to defendant that he reported no case for prosecution after the strike went into effect until August 31st (Rec. 145), and it was intended to show that the witness Winter was equally as fair.

These questions were perfectly proper, as they would have developed certain things the jury had a right to consider on the question of fairness, for it had been misled by the questions of counsel, and it had a right to judge the conduct of a witness *by his actions* and *not by counsel's suggestions.*

(*c*) *The Court erred in overruling plaintiff's objections to certain questions asked the witness Weeks, none of which was relevant to any real, bona fide issue in the case, but injected therein for the sole purpose of opening the door to irrelevant arguments.* (Rec. 161, 163, 172.)

(ASSIGNMENTS OF ERROR 7, 8, AND 9.)

It is unnecessary to discuss these Assignments of Error on the question of the fairness of the witness Weeks in reporting cases for prosecution during the strike in the summer of 1922. It is sufficient to say that evidence of a general condition or situation, to be in the least relevant, must have some connection with the specific acts complained of. But in the instant case it did not, for defendant claimed that

none of the cars involved in the first seventeen causes of action left Auburn or Centralia with penalty defects; and as to the eighteenth cause of action, it was not denied that defendant received a car from the Great Northern Railroad in the condition complained of.

But these questions raised by Assignments of Error 7, 8, and 9 will be more fully discussed in subdivision (*d*) page 63 hereof, relative to the admissibility of the large amount of "strike" testimony.

In connection with this question of the fairness of the two Government witnesses, it should be finally noted that the Court charged the jury to the effect that a strike "tends to array men on the two sides of the question;" that "they have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation;" and that "a bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized" (Rec. 299; Assignment of Error 29). The proceedings immediately following the taking of the exception to this part of the charge shows that it had reference to the witnesses, the two Government Inspectors, who had been denied the right to let the jury judge their sympathy and fairness by their actions. But the defendant's witness had every opportunity to testify to their actions in detail.

(*d*) *Evidence of the strike, and acts growing out thereof or in connection therewith were all irrele-*

vant and immaterial, and did not tend to support any of the issues in the case, and for the following reasons:

1st. *There was no causal connection between the strike and the movement of any defective car.*

2d. *It tended to mislead both the Court and the jury.*

3d. *It had a tendency to affect the verdict of the jury.*

(ASSIGNMENTS OF ERROR 7 TO 9 AND 13 TO 26.)

This was substantially the rule with respect to prejudicial testimony laid down in the case of *Matteson* v. *Sou. Pac. Co.*, 92 Pac. 101, and cases cited therein.

All the evidence about the strike related to *conditions in general*, to the situation at Auburn, Centralia, and Seattle, *and to other places not involved in this case.*

We do not want to be guilty of too much repetition, but in order to impress upon the Court the immateriality and irrelevancy of this "strike" testimony, we feel the necessity of again pointing out these pertinent facts:

Of the cars hauled from Auburn and Centralia not a single one was admitted to be defective in the respect complained of by the Government; in fact, it was claimed that each and every one was in good order.

Only as to one cause of action (8th) did the defendant claim that a car had a defect of any kind; and as to this, it was claimed that it was going to Renton for general repairs, "together with twenty-three or twenty-four others just like it." (Rec. 224.) And these damaged cars were switched into

a commercial train at a division terminal, Auburn, the morning of August 31st, and hauled to Renton. (Rec. 69; Ex. A2.) In this same commercial train were twenty-nine cars loaded with logs. (Ex. A2.) Thus combined together and hauled over the main line, this train of 77 cars—commercial cars in good order, 23 or 24 damaged cars, and 29 cars of logs—did not indicate that defendant was doing all that it reasonably could in the interest of safety; and this dangerous practice was not shown to be necessitated by the strike.

But to clarify the situation a little more with respect to the 8th cause of action, N. P. flat car 67105:

Neither of the witnesses for defendant, Crosby or McCullough, ever saw this car (Rec. 208, 220); but considering the defects or damages to the car, other than the missing brake wheel, which could have been replaced at Auburn, Crosby testified, in effect, that on *August 31st* they operated train No. 930 from Auburn, in which were a large number of logging cars going to Renton for repair; that they did not then have available men *at Auburn* to repair these cars; and that in his judgment such movement was necessary (Rec. 199).

But this should be noted: Crosby testified that during the strike cars were being sent from Auburn and Centralia to South Tacoma for repair (Rec. 209). Now, the N. P. flat car 67105 (8th count) *came from Tacoma (or South Tacoma) in a damaged condition*, for McCullough testified (Rec. 224) that this car arrived

in Tacoma *July 29th*, was unloaded and found in bad order (but no specific defects were shown by the witness); it was than held out of service until the night of *August 30th*, when, along with other bad order cars, it was moved to Auburn, and the following morning was hauled to Renton in train No. 930.

Now, *it may be true*, that if it was necessary to haul this car *from Auburn* for general repairs, Renton may have been the nearest available point *from Auburn*, as testified to by Crosby (Rec. 199), and as plainly evident from McCullough's testimony (Rec. 226). But the movement for repairs permitted by the Proviso is not, as suggested by defendant's character of testimony, "from the place where such equipment was first discovered to be defective" *by the Government inspectors, but has reference to the place where defendant first had knowledge of a car's defective condition.* That the Court was either misled by this assumption of defendant, or else concurred in such construction of the Proviso, is evident from its charge to the jury with respect to this 8th cause of action (Rec. 317; Assignment of Error 43), wherein it was said, in part:

> It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton. * * * I do not mean that you must find that is was impossible to repair this car at Auburn, but if you believe that the only practicable method,

> under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired, and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, * * * your verdict should be for the defendant on this cause of action.

This part of the Court's charge to the jury was substantially defendant's Requested Instruction 8 (Rec. 316), *and it should be particularly noted that Tacoma, or South Tacoma, where the car was found in bad condition over a month prior to the time it was hauled from Auburn, was not mentioned.*

We have thought it advisable to refer to this 8th cause of action somewhat in detail, for we want this Court to see just to what extent were camouflaged the issues in this case, and how the great mass of irrelevant, immaterial testimony relative to the strike had a strong tendency to mislead the Court and jury.

The greater part of this testimony relative to the strike has been set forth in the various Assignments of Error, and it is not our purpose to refer to these in detail, for we believe it is sufficient merely to summarize, without detailed duplication, this mass of testimony. This summary includes evidence relative—

> Unusual burden at Centralia.
>
> Acts of strikers or sympathizers in cutting air hose or knocking off grab irons after a train was made up at Auburn and Centralia.

Acts of strikers or sympathizers in cutting air hose, damaging angle cocks, and otherwise rendering equipment defective at Tacoma and Ellensburg, as well as Auburn and Centralia.

Act of cutting 22 air hose in one train.

Air hose being filled with waste; also steam hose.

Necessity for setting refrigerator cars on steam tracks to keep them from being filled up with waste.

Question of endurance so far as company concerned.

Everybody working constitutional limit.

Every nerve strained.

Insufficiency of men at Auburn to repair log cars hauled from there in train 930, which cars were not involved in this case.

Reasons of Northern Pacific for not employing new men until about July 18th.

Danger of repairing cars on transfer or interchange track in Seattle (18th count).

Train crews trying to bluff officials about cars being defective, and being particular about taking out trains with defects.

Condition of car 67105 (8th count) when it left *Auburn*.

Efforts to employ men at Auburn.

Unreasonableness of making repairs on transfer or interchange track in Seattle (18th count).

Critical attitude of trainmen, and acts of brakemen in crawling under trains to find defects.

Interference from outsiders; and great deal of interference from people in employ of defendant.

Intention of trainmen to delay trains.

Other Brotherhoods doing everything to help strikers.

Malicious acts of unknown persons, in disconnecting uncoupling levers, pulling apart or cutting air hose, in bending off stirrups (sill steps), and opening angle cocks to prevent getting full air pressure, and in doing other acts of sabotage.

Treatment of officials by train crews.

Critical condition at Centralia.

Inability to get men at Centralia account reputation of I. W. W. center.

It will thus be seen that this mass of "strike" testimony, with all its ramifications and angles, was wholly irrelevant; it had no connection with the *Centralia cases*, for the five cars hauled from there, defendant contended, were not defective. It had no bearing on the *Auburn cases*, for in 11 of those 12 counts, defendant also contended that the cars were not defective in any respect; and in the remaining count, the 8th, defendant's contention was that the car did not have a brake wheel missing, the defect complained of by the Government, but that it had other defects which defendant claimed had to be repaired at *Renton, the nearest available repair* point *from*

Auburn, although the evidence was undisputed that this car was discovered to be defective at Tacoma or South Tacoma, *over one month before it was hauled from there to Auburn, and then later from Auburn in a commercial train.*

It is plainly evident that the Court erred in admitting such irrelevant testimony.

(*e*) *Where the defendant introduced evidence to show, not merely that a car was not defective in the respect complained of by the Government (13th count; end handhold fouled by logs), but that this class of cars were so constructed that it was impossible for them to be so loaded with logs as to foul the handholds, it was proper rebuttal evidence for the Government to show:* (Rec. 187, 193, 194, 292.)

> 1st. *That defects of this kind had frequently occurred in the past and that reports of same had been furnished defendant's Car Foreman and Inspector of Equipment, two different individuals.*
>
> 2d. *That one morning during the progress of this trial, Government inspectors had found in the Northern Pacific yards similar cars so constructed and loaded that the handholds could be fouled by the lading (logs).*
>
> (ASSIGNMENTS OF ERROR 10, 11, 12, AND 27.)

This evidence was clearly admissible. For instance, take the defendant's position with respect to this 13th cause of action. It claimed that the car was not defective; then it introduced "strike" testimony, having no causal connection with its defense that the car was not defective or that it was so

constructed that it could not have its handholds fouled. Therefore, it was proper for the Government to show in rebuttal that prior to the strike similar cars, so constructed that their handholds could be fouled, were operated on defendant's line, and this fact was brought home to defendant's officials. This testimony offered in rebuttal had a threefold purpose: First, it would show that the strike had nothing to do with this character of defect; second, such conditions having existed long prior to the strike, it would have a further tendency to rebut the suggestion that the Government inspectors had been unfair to defendant for reporting cases for prosecution that arose by reason of, or grew out of, this strike; third, it was in rebuttal of defendant's evidence that such cars were so constructed that they could not have their handholds fouled by logs, a defense which the Government was not required to anticipate in its case in chief and which was not disclosed by the pleadings.

For the reasons stated, the Government contends that the Court erred in not permitting it to introduce the testimony set forth in Assignments of Error 10, 11, 12, and 27.

Questions Involved—No. 3.

Assignments of error 28 to 31.

This involves certain instructions given the jury all growing out of the "strike" testimony, and while they are somewhat similar in that respect, it is deemed

advisable to discuss each Assignment separately, for in that way the Court can better appreciate the errors committed and the Government's position.

(*a*) *It was error for the Court to charge the jury that it might take the "strike in account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective.*" (Rec. 298.)

(ASSIGNMENT OF ERROR 28.)

It is unnecessary here to set forth the whole charge of the Court embodied in this Assignment of Error; it is sufficient to say that in connection with the part quoted above, the Court suggested to the jury that "it might be concluded, if the evidence was sufficient, that they [Auburn and Centralia] had ceased to be available repair points."

But this whole charge was wrong; it was not justified by the slightest evidence, for no car was hauled from Centralia for the purpose of making any kind of a repair, and the evidence of defendant's witnesses, in substance, was: "We inspected the cars ourselves; we did just as good work as the regular inspectors, for none of the cars involved left Centralia in a defective condition." That is all there was to the *Centralia cases*, and the Court's reference to same in this part of its charge was wholly irrelevant and misleading to the jury.

And the same situation existed with respect to the work of the officials at Auburn; for in no single instance, not even as to the 8th count, did any witness claim or suggest that any car had to be, or was, hauled from Auburn, as charged by the Court, *"for the purpose of making the repairs in the matters that are claimed to have been defective."* (Rec. 298.)

If the Court thought it advisable for the jury to consider the movement of N. P. car 67105 (8th count) for the purpose of repairing defects defendant showed it had discovered at Tacoma, or South Tacoma, over a month before, it could readily have done so only in a general way, for the Record is significantly silent as to what these needed repairs were; but it was evidently the theory of the Court, as heretofore pointed out, unless inadvertently misled by defendant's shifting position, that the movement permitted by the Proviso was from the point where a car was discovered to be defective by the Government. Of course, this would naturally infer that the defendant itself had discovered the defect (but not necessarily at the same place), for otherwise there could not be present the intent or purpose to haul the car for repairs.

It is evident that this part of the Court's charge was wholly wrong; it was not based upon facts, or even suggestion, so far as Centralia and "matters that are claimed to have been defective" are concerned.

But for further discussion of this 8th count from another angle, the attention of the Court is directed

to Questions Involved—No. 4: Assignment of Error 32, beginning at page 77 hereof.

(*b*) *It was error for the Court to charge the jury that "a strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. It works both ways."* (Rec. 299.)

(ASSIGNMENT OF ERROR 29.)

The proposition thus advanced by the Court can not be denied when, or if, aimed at certain individuals, provided there is some evidence to justify such allusion. There were but two classes of persons that could be covered by this statement, or charge, of the Court; these were the Government inspectors and the defendant's witnesses. (Rec. 299.) The latter were given every opportunity, *both by the Court and plaintiff*, to show their fairness, and at no time did the plaintiff suggest by its method of questioning, or the use of innuendoes, that the sympathy of defendant's witnesses for the defendant affected their testimony. But this is not true with respect to the Government inspectors, for their fairness and veracity were continually assailed by defendant, and plaintiff was denied the right to show the actions and conduct of these inspectors in order that the jury might have

every opportunity to judge their sympathy, fairness, and veracity, just as it had of judging the sympathy and fairness of defendant's witnesses. (The word "veracity" is purposely omitted from this last clause, for we disclaim all intention of even suggesting that any of defendant's witnesses made any false statement.) This question of fairness, which is naturally akin to sympathy, has been discussed in Questions Involved—No. 2, subdivisions (b) and (c), pages 59, 62 hereof.

Therefore, this charge of the Court relative to sympathy of the witnesses, and its effect upon the weight to be given their testimony, was erroneous. It subserved no good purpose; but, instead, *it emphasized the comparison between the fairness of witnesses, who, unhampered and unfettered, were allowed to tell their plain, straightforward story, and those other witnesses, the Government inspectors, who were not so fortunate.*

This charge of the Court was also erroneous, *because it suggested sympathy.*

(c) *It was error for the Court to charge the jury to the effect that if, after defendant had inspected cars, mischievous individuals rendered them defective, and the company did not discover them until they got out on the line, the defendant would not be liable.* (Rec. 308).

(ASSIGNMENT OF ERROR 30.)

(d) *It was also error for the Court to charge the jury to the effect that if defendant inspected a train within a reasonable time before its departure the train should*

be considered as upon the line, and defendant would not become liable if it exercised a high degree of care until it discovered the defects, when it would again be its duty to repair the car wherever found, if it could be repaired there; if not, then to take it to the nearest available point to remedy the defects. (Rec. 309.)

(ASSIGNMENT OF ERROR 31.)

These instructions show to what extent the "strike" testimony misled the Court, and undoubtedly the jury; for there was not the least bit of evidence upon which to base such a charge as either of the above.

There was some general, prejudicial testimony admitted over the objections of the Government that might have formed a basis (not necessarily legal) for either of such charges *had it related to any particular cause of action, but which it did not.*

In no single instance was it even suggested that a mischievous individual rendered any of the 18 cars defective, nor was it shown, or attempted to be shown, in any case that a car was inspected "within a reasonable time before its departure," *and that thereafter it became defective.*

But in the *Auburn* and *Centralia cases* it was testified that no car left either place with the defects complained of; and that as to some defects to the car involved in the 8th count, they were found over a month before the car arrived in Auburn.

In view of the fact that there was no basis for either of the above charges, it is unnecessary to discuss the law as embodied therein.

Therefore, both of these charges were erroneously given, not only because of the lack of some evidence to support them but because, along with the "strike" testimony, they had a tendency to mislead the jury.

Questions Involved—No. 4.

Assignment of Error 32.

The Court erred in refusing to direct a verdict for the plaintiff on the 8th cause of action, the one involving the car hauled out of Auburn with a hand brake wheel missing. (Rec. 313.)

This request for a directed verdict was very properly refused *if* we are to give any consideration to the testimony of two of defendant's witnesses to the effect the brake wheel was not missing when the car left Auburn. (Rec. 250, 260.) And we can not ignore such testimony even if it was of a negative character. On that theory nothing remains to be said. It simply resolved itself into a question of whether the jury should give greater weight to the positive testimony of the Government inspectors or to the negative testimony of defendant's witnesses. And, therefore, with that count in the same situation as the remaining counts involving cars hauled from Auburn and Centralia, the Court erred in not instructing the jury as requested by plaintiff in its requests Nos. 5 [3], 8, and 9. See question immediately following, subdivisions (*a*), (*b*), and (*c*).

Questions Involved—No. 5.

ASSIGNMENTS OF ERROR 36 TO 42.

(*a*) *It was error for the Court to refuse to charge the jury as follows, the same being plaintiff's Request for Instructions No. 5* [3] (Rec. 314):

> *If the jury believes, from a fair preponderance of the evidence, that any car was hauled by defendant from Auburn or Centralia in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.*
>
> (ASSIGNMENT OF ERROR 36.)

The Court read plaintiff's Request No. 5 [3] to the jury, as above set forth, but qualified it by adding thereto the following (Rec. 300):

> * * * *unless moved for the purpose of being repaired, as I have explained to you.*

Now, plaintiff's request related to cars with defects "alleged in the Government's complaint," none of which, as claimed by defendant, were defective, and therefore were not being hauled for repair. So, the Court's qualification of this Request, *suggesting a necessary movement*, was not justified by the facts.

(*b*) *It was error for the Court to refuse to charge the jury as requested by plaintiff in its Request for Instructions No. 8, as follows* (Rec. 314):

> *It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to inspect and repair the cars involved in this case.*
>
> (ASSIGNMENT OF ERROR 37.)

The effect of this instruction was destroyed by the Court, for while the same was read as requested, the Court qualified same by saying (Rec. 300):

> *Yet you may consider what the evidence has shown in that respect in determining the nearest available repair point.*

The Government's request should have been granted, for it was justified by the evidence, whereas the qualification thereof by the Court was not based on any evidence.

It may have been true that defendant had some trouble in getting the most competent men to inspect and repair cars, for it made no effort to do so until nearly three weeks after the strike went into effect; but that had no bearing on the instant case. As to the cars involved, the evidence of defendant's officials was to the effect that they worked long hours, strained every nerve, and actually inspected and repaired the safety appliances on these cars, if they were defective, before the cars left Auburn or Centralia. (Note Questions Involved—No. 6 (*b*); Assignment of Error 44, capitalized part, page 96 hereof.) This testimony related to all cars leaving those places, excepting the one involved in the 8th count, the one with a missing brake wheel; and as to that, defendant did not seem to know just what position to take, for one witness, Crosby, testified that they would make even a temporary repair to a car that was going to Renton (Rec. 210), but another witness did not seem to be so sure of that (Rec. 263).

But notwithstanding the fact that there was no evidence even suggesting that a brake wheel could not be applied at Auburn, or that the car was being hauled to the nearest available repair point from Tacoma, or South Tacoma, or that it could not be repaired at Tacoma or South Tacoma where it was found defective one month before, the Court's qualification of this request had the effect of a suggestion to the jury that there was evidence of such character, and it therefore had a tendency to mislead the jury.

With respect to this 8th count, there was not the slightest evidence to suggest "that the movement of the car complained of by the Government was necessary in order that the repair could be made, nor that the repair could not, consistently with a proper operation of defendant's railway even, have been made at the point where the defect was *originally discovered.*" (Italics ours.) The quoted part is taken from opinion of Judge Bledsoe in the case of *United States* v. *A. T. & S. F.*, 220 Fed. 215.

At this point it might be well to consider together three Requests for Instructions made by plaintiff, which the Court refused to give, the same being Nos. 12, 14, and 15.

(*c*) *It was error for the Court to refuse to give the jury the following instructions, as requested by plaintiff* (Rec. 314–316):

No. 12. *In order to comply with the spirit of the law, the defendant can not establish a*

division terminal and make up trains at such terminal and haul in such trains cars with defective safety appliances, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repair men at Auburn or Centralia hauled any of the cars from these points in road service in the condition complained of by the Government.

(ASSIGNMENT OF ERROR 39.)

No. 14. *The jury must not return a verdict for the defendant on any cause of action, unless it appears that the defective cars were hauled by themselves for repair, or hauled in what is known as a hospital train. Good order and bad order cars can not be assembled together in a train and hauled from a terminal, some for repair and some in commercial service. And the burden is on the defendant to show that this was not done.*

(ASSIGNMENT OF ERROR 41.)

No. 15. *The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, can not be considered as an excuse for not repairing the defective equipment in question.*

(ASSIGNMENT OF ERROR 42.)

The Court read to the jury plaintiff's Request No. 12, but qualified it by adding (Rec. 302):

Notice the words "in road service." They would have a right, if they could not be repaired there and it was necessary to move them in

order to secure the repairs, to haul them to the nearest available repair point, because they would not be in road service.

Plaintiff's Request No. 14 was not given in any form, but Request No. 15 was read to the jury, qualified as follows (Rec. 302):

* * * *provided you find it could have been repaired at Auburn or Centralia.*

In the application of these Requests to the instant case let us look at train No. 930, which left Auburn with 77 cars. Twenty-nine of these cars were loaded with logs; 23 or 24 of them were in bad order and had been brought from Tacoma or South Tacoma to be hauled in this train, or at least in some train; eight of them had penalty defects, according to the Government's testimony, one of which was also defective in other respects and so admitted by defendant. This car was the one with the brake wheel missing.

It can not be denied that this was a dangerous practice; and while we do not know to what extent these 23 or 24 other cars were defective, the witness McCullough testified (Rec. 224) that they were going to Renton for general repairs, just like N. P. car 67105, which was the one with the missing brake wheel and some other defects not disclosed by the Record; therefore, we may assume, for sake of argument, that they also were seriously defective, as the witness Weeks testified with respect to all the cars involved, and without contradiction (Rec. 144). But aside from that, the movement of any defective car that requires general repairs in a good order com-

mercial train can not be said "to promote the safety of employees and travelers."

Then to add to the questionable operation of this train, defendant also put in it 29 cars loaded with logs, which character of lading defendant's mechanical superintendent testified might shift before the car was moved 10 feet. (Rec. 287.)

While it is not a violation of law to commingle ordinary commercial cars with logging cars if the safety appliances are in good condition, yet from a safety first standpoint, like the inclusion of the cars that required general repairs, such practice can have no tendency "to promote the safety of employees and travelers."

But it is evident that the trial Court was of the opinion that *any manner of movement* of a defective car for repair was permissible, for no other conclusion can be reached when the charge to the jury is read and the instructions requested by plaintiff, but denied, are reviewed.

Just briefly, let us see what little law there is on this question:

When the Proviso of the 1910 Act was being framed the Senate Committee on Interstate Commerce, on February 18, 1910, submitted its Report (No. 250, 61st Congress, 2d Session); and in this Report, accompanying House Bill 5702, we find the following, at pages 3 and 4:

> As there is danger in the movement of such defective cars, and as trainmen are obliged

> to handle them without any real option on their part so to do, it is but just and equitable that the risk attendant upon such movement where death or injury to trainmen results should be borne by the carrier and not in any degree assumed by the trainmen.
>
> It is one of the perils of the operation of the railroad for which trainmen are not at all responsible. As it is practically obligatory upon the trainmen to incur such dangers, there should be no impairment of any right of such trainmen by reason of the performance of such dangerous duty * * *.
>
> * * * *This amendment does not permit the movement of damaged cars in connection with those commercially used, and in every other respect the interests of the employees have been fully safeguarded.*

When the Senate Conference Report was made on April 4, 1910 (Report No. 932, to accompany H. R. Bill 5702), nothing was said along this line, but there had been incorporated into the Proviso, as agreed upon, that which the Government, in its endeavor to promote safety, construes to mean that damaged or defective cars must be excluded from use in connection with commercial cars.

The Proviso in question is set forth in full on page 50 hereof, and incorporated therein will be noted a sub-Proviso, which reads:

> and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are

> commercially used, unless such defective cars contain live stock or "perishable" freight.

But there are two things in the Proviso in chief to which we desire to call particular attention; these provide that—

> *such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired* * * * IF SUCH MOVEMENT IS NECESSARY TO MAKE SUCH REPAIRS and such repairs can not be made except at such repair point. (Italics and capitals ours.)

Now, in order to comply with the law it is necessary for a carrier to repair its cars; but, of course, we realize that repair points for heavy repairs can not be carried around on wheels; and, therefore, at times a carrier must haul a car "to the nearest available point where such car can be repaired" in order to have it put in a safe, serviceable condition, *which, in itself, would be a necessary movement.* Therefore, we may ask: Was the phrase capitalized above inserted without due regard to its meaning, simply as a matter of reiteration or emphasis, or was it incorporated in the Proviso with some other object in view?

We can not escape the conviction that the phrase "if such movement is necessary to make such repairs" was intended to have a well-defined, safety-first meaning, and that it relates to the *manner of movement* under the circumstances in

each case, rather than *any* character of movement. Therefore, applying such construction to the 8th cause of action, it would mean that the car with the missing brake wheel, and "other defects," could be hauled from the point of discovery (Tacoma or South Tacoma) to the nearest available repair point *from Tacoma or South Tacoma*, and in such way as was absolutely necessary to get it to such repair point; provided, of course, it could not be repaired at Tacoma or South Tacoma, which was not shown or even suggested by defendant; and provided further, that the manner of movement was also necessary, which was not shown, so far as Tacoma, South Tacoma, or Auburn are concerned.

Having in mind the fact that this car was assembled in a commercial train at Auburn, hauled from there in association with good-order cars, and no attempt made to justify such *manner of movement*, even (for the sake of argument) as the necessary result of the strike, the Court should have instructed the jury that its verdict must be for the Government as to any car that left Auburn or Centralia in the defective condition complained of by the Government. (See Questions Involved No. 5; Assignment of Error 36, page 78 hereof.)

This request (Government's Request No. 5) should also have been granted for the reason that defendant made no effort to justify the movement from Tacoma or South Tacoma.

Therefore, plaintiff's Requests Nos. 12 and 14 (Rec. 314, 315, page 81 hereof) should also have been granted, for two reasons, 1st, because, as a matter of law, no justification should be said to exist for making up a commercial train at a division terminal and include therein cars with serious defects; 2nd, because in this case defendant made no effort to show that it could not have made up a so-called hospital train and hauled to Renton the 24 or 25 cars that were to receive general repairs, including the 8th count car. Had such a train been made up at Tacoma or South Tacoma, where the cars were really discovered to be defective, it would have saved time and work and considerable unnecessary switching, all of which would have had a strong tendency "to promote the safety of employees and travelers."

This construction of the phrase, "if such movement is necessary," was adopted by Judge (later Justice) Clarke in a case against the Erie Railroad, unreported. Notwithstanding the fact that the Sixth Circuit Court of Appeals reversed the judgment in this case (240 Fed. 28), basing its decision upon the construction of the sub-Proviso, we find so much reason in Justice Clarke's opinion that would tend, if adopted, "to promote the safety of employees and travelers," that it is deemed advisable to call attention to the following language therefrom:

> For the purpose of this motion we have it admitted that these five cars which were out of order were hauled a distance of three or four

miles from a switching yard, in which they were assembled from various railroads and plants, to another switching yard, where there were repair shops; and that they were hauled in what may be called a commercial train, having in it cars loaded with interstate traffic or moving in interstate commerce, and some of which were in good order. We must also assume, for the purposes of the motion, that the cars in question were otherwise defective than in the respects proved by the witnesses so far called; that in these other respects they could not be repaired at the point where the defects were discovered by the government witnesses, the NK yard, and that they must be taken to Briar Hill yard to be repaired.

The question is whether the evidence introduced, taken with the assumptions which I have stated, made necessary the movement which it is admitted was made, or whether the language of the act is such that courts and juries may distinguish between one manner of movement and another and say that one manner of movement is necessary and another not. Assuming that the cars must be moved from the NK yard to the Briar Hill yard in order to be repaired, does this act give the common carrier the right to move them in any way it sees fit? Or, must they be moved in a manner consonant with the spirit and purpose of the act itself before the movement can be said to have been necessary?

The Circuit Court of Appeals of this Circuit, in speaking of this act before the 1910 amendment, says:

"It is well settled that the object of the safety appliance act being remedial and humanitarian in its purpose, to protect the lives and limbs of railroad employees by making it unnecessary for men operating the couplers to go between the ends of the cars, the act is not to be construed so narrowly as to defeat the obvious intention of the legislature." (*Southern Railway Co.* v. *Snyder*, 187 Fed. 492.)

If that is the purpose—and, for the purpose of this motion, we must accept this as settled law—then it would seem to me to be the duty of the court to construe this proviso in such a manner as will enable us to distinguish between movements which are made, let us say, in a manner which would expose the employees to extraordinary dangers as compared with movements which might be made of the cars which would expose them to lesser risks. Considering only the case which we have in mind, of cars assembled in a yard for distribution to various railroads, and having before us simply the question where a number of cars are found scattered through such a yard in a condition of repair such that the law forbids their movement unless they fall within the proviso of the act, I am persuaded that it will not do to say that a necessity existed for transporting those defective cars in a train in association with cars in good order, and that no amount of proof which could be produced would justify the court in submitting the question of the existence of such necessity to the jury. It would have been no great expense, it would have been no great inconvenience for a com-

> pany under such circumstances to run a special train of bad order cars from the NK yard to the Briar Hill yard.
>
> Such a movement as the one admitted to have been made, as has been aptly said, might be at night, and must be made under such conditions that the men working on the cars would not know which cars were in good order and which were not. I cannot think, having regard to the purposes of this act, as construed by the Circuit Court of Appeals of this Circuit, that I should submit to the jury the question of whether or not the necessity existed for hauling these defective cars in the manner in which they were hauled over the line of the defendant.

It will thus be seen, that the Proviso in chief permits certain movements for repair, *if the manner thereof is necessary*, but by the express terms of the sub-Proviso, "the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, * * *" was not considered by Congress as a necessary manner of movement.

In a case against defendant herein, supra, this Court considered the necessity for certain manner of movements, and in its opinion said, at page 784:

> Or, we presume, in a case where there are no means for repairing the cars at the junction of the roads, they might be hauled, *without being taken into freight trains or used therein*, and thus moved, in what are termed hospital trains, to a convenient place for repair. (Italics ours.)

If there is no justification for commingling good order and bad order cars at a junction point, where there are little or no facilities for repairing or switching or storing cars, how can there be any justification for assembling them in a 77-car train at a busy terminal, through which 2,500 cars are handled daily, with all the necessary switching that such assembling must involve?

And, for similar reasons of wisdom and safety, the trial Court should have charged the jury, as requested by plaintiff in its Request No. 15, to the effect that "other defects" can not be used as an excuse for not repairing a penalty defect, a missing brake wheel. We agree that in some cases it might be true that "other defects" might prevent a penalty defect from being remedied; but if so, the carrier, who must justify any movement of a defective car, should show such relation between the penalty defect and "other defects" as would prevent the former from being repaired, even temporarily, until the latter had received some repairs. But no attempt was made in this case to show such relation between the several defects.

(*d*) *The Court erred in refusing to instruct the jury as follows, as requested by plaintiff, being its Request No. 9* (Rec. 314):

> *The provisions of the safety appliance acts are of such nature that they can not be ignored or set aside by a carrier on the ground that a strike has interfered with its operation. But the safety of other employees, those who operate*

trains, as well as the traveling public, is to be placed above the question of inconvenience to the carrier of keeping its equipment in repair.

(ASSIGNMENT OF ERROR 38.)

The Court merely read to the jury the *first sentence* of this Request (Rec. 301), but refused to instruct the jury with respect to the question of inconvenience, as requested in the last sentence.

The fact that it is inconvenient "to promote the safety of employees and travelers" can not be accepted as an excuse.

United States v. *Pere Marquette*, 211 Fed. 220.

United States v. *A. T. & S. F.*, 220 Fed. 215.

Virginian v. *United States*, 223 Fed. 748.

Pennsylvania v. *United States*, 241 Fed. 824.

Cases Cited, Kent's Digest (*1915*), p. 15 (*d*).

We can not escape the conviction that, even without legislative requirement, a carrier's convenience should be subordinated to the safety of employees and travelers. And as a general proposition, if we may judge by the few decisions on the subject, most carriers have seen the wisdom of such policy.

(*e*) *The Court erred in refusing to grant plaintiff's Request for Instructions No. 13, in that it refused to instruct the jury that "as to each of the cars hauled from Auburn or Centralia the jury must return a verdict for the Government unless the defendant has shown," among other things not heretofore considered* (Rec. 315):

4th. *That the defendant was hauling the car for the sole purpose of putting it in repair, and that such repair could not be made at Auburn or Centralia,*

5th. *That such car was actually repaired at the nearest available point from Auburn or Centralia.*

(ASSIGNMENT OF ERROR 40.)

The Court read the 4th condition, with the exception that it omitted the word "sole"; the 5th was rejected in toto. (Rec. 302.)

This request had, in part, a twofold purpose: The Court, as heretofore pointed out, had taken the position that it was only necessary to consider the nearest available repair point *from Auburn*, and therefore refused plaintiff's Request No. 1 (Assignment of Error 32), and also its Request No. 5 [3](Assignment of Error 36). Request No. 13 was prepared to meet such a contingency, for the Government had a right to meet the defense that the movement of any car from Auburn or Centralia was justified.

There was no suggestion that any car moved from Centralia was for the purpose of repairing it, for in none of the five *Centralia cases* did the defendant show that any car had been properly equipped, and that it had discovered the defects; in fact, its defense was that each car was not defective when it left Centralia.

As to the *Auburn cases*, it was also contended that the equipment in question was not defective; but looking at it from another angle, it was not shown that the brake wheel could not be replaced at Auburn.

The 4th condition was a proper one, for we believe that the movement of a defective car from a terminal, if justifiable at all, must be for the *sole* purpose of being repaired, and while the omission of the word "sole" from the Court's charge may not have been misleading, it, nevertheless, should have been given as requested.

The difference between the 4th and 5th conditions is this: The 4th shows the *intention* of the carrier in moving a car; the 5th is but the *execution* of such intention. If there was a bona fide intention to repair a car at a certain place, the execution of that intention was certainly material; for, in this case, it would have tended to corroborate testimony as to such intention, and also would have shown, *in the absence of other evidence*, what repairs the car actually needed and received.

We have thought it advisable thus to explain the Government's position in respect to this Request No. 13, but it is only fair to this Court to say that, from a technical point of view, the Request may have been properly refused. In preparing same there was a phrase inadvertently omitted from the first part, which would have made it read:

> As to each of the cars hauled from Auburn or Centralia, *if found to be defective as alleged*, the jury must return a verdict for the Government unless the defendant has shown:

The italicized part was omitted from Request No. 13, but this was interpolated by the Court when granting such request with respect to the first three conditions. (Rec. 302.)

Questions Involved—No. 6.

ASSIGNMENTS OF ERROR 43 AND 44.

(*a*) *The Court erred in granting defendant's Request No. 8 and charging the jury, in effect, that the movement of the car involved in the 8th count FROM AUBURN, and the availability of AUBURN as a place for repairing such car, should be considered, although the car had been discovered to be defective at Tacoma or South Tacoma over 30 days prior to its movement from Auburn.* (Rec. 305, 316.)

(ASSIGNMENT OF ERROR 43.)

The Record with respect to this cause of action has been gone over several times from different angles; and, with the exception of two suggestions, we do not believe we can add anything to what has already been said.

But this should be noted: This car was discovered to be defective at Tacoma, or South Tacoma, over 30 days before it was moved to Auburn, but we know nothing about what defects were discovered, to what extent it was further damaged by the necessary switching in getting it out of Tacoma, or South Tacoma, into Auburn and out of Auburn again; the Record is "speechless" in this respect. But notwithstanding the fact that the bill for Renton repairs would show just what work was done (Rec. 209) (although this might not prove the car's condition

when it left Auburn, much less when it got into Tacoma, or South Tacoma, over a month before it left Auburn), defendant did not endeavor, to this extent, to bring itself within the Proviso.

There is one other important thing in connection with this charge, which is that portion reading as follows (Rec. 305):

> The defendant *admits* that this particular freight car * * * *was in a defective condition.*

The defendant never made any such admission with respect to the brake wheel being missing; in fact, it refused to make such an admission (Rec. 53), and went so far as to deny that this car had a missing brake wheel (Rec. 250, 260). Therefore this Request and allowance thereof by the Court contained either an inadvertent misstatement, which naturally misled the jury, or was irrelevant to the extent that it related to the matters foreign to the issues; that is, to "other defects" only, and did not include therein the missing brake wheel. There was nothing in the evidence to indicate or suggest that the brake wheel could not very easily be replaced at Auburn, not to mention Tacoma or South Tacoma, if it was so defective there, and the effect of the Court's charge if not misleading, gave the jury to understand that the question of the brake wheel being replaced at Auburn was outside the issues. In either event the

Request was not justified and the allowance thereof was erroneous.

(*b*) *The Court erred in granting defendant's Request for Instructions No. 11 and charging the jury as requested, but more particularly as follows* (*the italics and capitals being ours*):

> *The defendant* * * * *has alleged that* * * * *certain of its employees had left its service* * * * *and that among such employees were its car inspectors and car repairers, and that* * * * *it was* * * * *necessary that it use many of its other officers and employees for such* (*repair*) *purpose, and that it did not have available the repair facilities that it would have otherwise had, but that* IT DID MAKE ALL REPAIRS NECESSARY *to comply with the Act of Congress referred to and the regulations issued pursuant thereto* AS ALLEGED IN THE SEVERAL CAUSES OF ACTION HEREIN. *While the fact of such withdrawal of certain of its employees from its service would not authorize it to violate the Act of Congress and the regulations issued pursuant thereto under which this action is brought,* YOU WOULD BE AUTHORIZED IN CONSIDERING THE EVIDENCE TO TAKE INTO CONSIDERATION SUCH SURROUNDING CONDITIONS FOR THE PURPOSE OF DETERMINING THE ISSUES SUBMITTED TO YOU, AND THE EVIDENCE IN CONNECTION THEREWITH. (Rec. 307.)
>
> (ASSIGNMENT OF ERROR 44.)

This whole charge, *requested by the defendant*, was but a brief résumé of certain features of the case; but it would appear therefrom that the admission of the mass of irrelevant testimony offered by defendant was attempted to be cured by the instruction that the strike and withdrawal of employees would not authorize the carrier to violate the law.

We believe that enough has been said with respect to the "strike" phase of the case, but in concluding this subject we would like to ask if, as said in the above charge, defendant *itself made all the repairs necessary to comply with the Act and Orders as alleged in the several causes of action*, in what respect was the "strike" testimony relevant?

Questions Involved—Nos. 7 and 8.

(18th count.)

ASSIGNMENTS OF ERROR 33, 34, AND 35.

One carrier can not receive from another carrier a car with a defective safety appliance; nor can it justify the movement of such car and bring itself within the Proviso, where it appears that the receiving carrier made no attempt to discover the defects and did not know that the same existed.

It was, therefore, error for the Court to refuse to direct a verdict for the Government; it was error to direct a verdict for the defendant instead of submitting same to

the jury; and it was error to enter judgment in favor of the defendant and against the Government. (Rec. 313, 314.)

It is unnecessary again to refer to the facts on the 18th cause of action, the only one involving a question of this kind; they are all set forth on page 18 hereof.

No reason was assigned by the Court for its action in directing a verdict for the defendant on this count, and we are at a loss to understand why such action was taken. But what little suggestion there was on behalf of defendant, its plan of defense, and possibly the Court's view of the situation, can be briefly referred to.

The Court *sustained* the Government's objection to the following question asked of the witness Winter on cross-examination by counsel for defendant (Rec. 110):

> Do you think it advisable from the standpoint either of the Railroad Company or the general public in the city of Seattle to have had a crew of car repairers, who of course would be taking the place of the strikers, working on cars as close to Whatcom Avenue as was this transfer track?

But the following question was asked the witness Weeks on cross-examination by counsel for defendant, and an objection *overruled* (Rec. 172):

> Is it your opinion, Mr. Weeks, knowing the conditions which you did know at that time,

> that it would have been reasonably safe for any man—official or new employee of the Northern Pacific—to go out on that transfer between the street car track and Whatcom Avenue and attempt at that time to have shimmed up or repaired this drawbar?

Observe the answer to this last question (Rec. 173):

> Mr. WEEKS. It would have been as safe there as any other place on the road, in my opinion.

Now, if the question of safety in making such repair on the transfer track was an issue in the case, it should not have been decided by the Court, but ought to have been submitted to the jury. See *Empire State Cattle Co.* v. *A., T. & S. F.*, 210 U. S. 1.

But the question of safety was not a proper issue in this count. The fact is the defendant did not refuse to receive the car from the Great Northern; it made no effort to inspect it, and therefore made no effort to repair it. In these respects the case is on all fours with that other case (No. 3909) against this same defendant, decided by this Court March 12, 1923. (287 Fed. 780.)

We believe it is unnecessary here to quote from the opinion of this Court in that case, for the whole opinion is a refutation of any suggestion of defendant that it did not violate the law in receiving and hauling from the Great Northern interchange track the car with the low drawbar.

CONCLUSION.

Wherefore it is respectfully submitted that the judgment of the trial Court should be reversed and the case remanded for a new trial, together with instructions to sustain the Government's demurrer to the affirmative defense of defendant's answer.

THOS. P. REVELLE,
United States Attorney.
C. E. HUGHES,
Assistant United States Attorney.
M. C. LIST,
Special Assistant to the United States Attorney,
Attorneys for Plaintiff in Error.

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